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Recent Cases

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NEGLIGENCE—THE END OF THE IMPACT RULE IN PENNSYLVANIA

Niederman v. Brodsky, 436 Pa. 401, 261 A.2d 84 (1970).

The Supreme Court of Pennsylvania recently abolished what is commonly referred to as the impact rule. In a complete reversal of existing precedent, the court, in *Niederman v. Brodsky*[1] held that physical impact was no longer a prerequisite to recovery where the plaintiff sustains injury solely from a fear of being struck. This decision overruled *Bosley v. Andrews*[2] and cast doubt on the present validity of *Knaub v. Gotwalt*.[3]

The plaintiff, Harry Niederman, alleged he was standing with his son on a sidewalk in Philadelphia. The defendant's negligently operated car skidded onto the sidewalk striking the boy, a pole, a fire hydrant and a newsstand. The plaintiff claimed that he almost immediately sustained a heart attack which resulted in a five week hospital confinement.[4] Since no impact was alleged, the lower court sustained the defendant's preliminary objections and reluc-

1. 436 Pa. 401, 261 A.2d 84 (1970).
2. 393 Pa. 161, 142 A.2d 263 (1958).
3. 422 Pa. 267, 200 A.2d 464 (1966).
4. More specifically, the opinion stated:

> Almost immediately after this destructive path was cut by appellee's car, appellant claims that he suffered severe chest pain and that upon examination in the hospital, where he was confined for five weeks, appellant was diagnosed to have sustained acute coronary insufficiency, coronary failure, angina pectoris, and possible myocardial infarction. Consequently, appellant sought recovery from appellee for both these severe disabilities and the accompanying shock and mental pain.

436 Pa. at 402-03, 261 A.2d at 84.

tantly dismissed the complaint.[5] The plaintiff appealed.

The Pennsylvania Supreme Court, holding that the plaintiff was entitled to a trial, stated:

> Today, the cows come home.[6] We decide that on the record before us, appellant may go to trial and if he proves his allegations, recovery may be had from a negligent defendant, despite the fact that appellant's injuries arose in the absence of actual impact. "It is fundamental to our common law system that one may seek redress for every substantial wrong. 'The best statement of the rule is that a wrongdoer is responsible for the natural and proximate consequences of his misconduct. . . .' "[7]
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> Were we to do otherwise, appellant and those who are severely injured in a like manner would be barred from recovery in our courts. But the gravity of appellant's injury and the inherent humanitarianism of our judicial process and its responsiveness to the current needs of justice dictate that appellant be afforded a *chance* to present his case to a jury and perhaps be compensated for the injury he has incurred. The Restatement has adopted a view in harmony with this approach. . . .[8]

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5. The court quoted the opinion of the lower court which prophetically stated:

> The impact rule will, no doubt, eventually be rejected as was the formerly well-entrenched rule of charitable immunities. It is regrettable that Harry Niederman, the plaintiff in this action, may not be afforded the opportunity to prove that his injuries are just as real, just as painful, just as disabling as if he had been struck physically by defendant's motor vehicle. However, we are bound by the law as set forth by the Supreme Court.

436 Pa. at 403, 261 A.2d at 85.

6. (footnote omitted). (The Atlantic Reporter reads, "Today we decide. . . ."). This statement is in response to the late Justice Musmanno's dissent in *Bosley v. Andrews*, which denied recovery to the plaintiff who was chased by the defendant's bull:

> In recapitulation I wish to go on record that the policy of nonliability announced by the Majority in this type of case is insupportable in law, logic, and elementary justice—and I shall continue to dissent from it until the cows come home.

393 Pa. 161, 194-95, 142 A.2d 263, 280 (1958).

7. (footnote omitted); *see* Robb v. Pennsylvania R.R., 210 A.2d 709 (Del. 1965); Bowman v. Williams, 164 Md. 397, 165 A. 182 (1933); Falzone v. Busch, 45 N.J. 559, 214 A.2d 12 (1965); Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961); Held v. Red Malcuit, Inc., 12 Ohio Misc. 158, 230 N.E.2d 674 (C.P. 1967); Lambert v. Brewster, 97 W. Va. 124, 125 S.E. 244 (1924).

8. 436 Pa. at 403-04, 261 A.2d at 85 (footnote omitted). The court here quoted from RESTATEMENT (SECOND) OF TORTS § 436(2) (1965), which provides:

> If the actor's conduct is negligent as creating an unreasonable risk of causing bodily harm to another otherwise than by subjecting him to fright, shock, or other similar and immediate emotional disturbance, the fact that such harm results solely from the internal operation of fright or other emotional disturbance does not protect the actor from liability.

The court discredited three reasons which it had previously used for denying recovery in the absence of impact. The first argument in support of the impact rule was the supposed inability of medical science to prove causation. The court mentioned the increased sophistication of medicine,[9] but quickly pointed out that the major weakness of this argument is that it was used only when there had been no contact whatsoever.[10] Medical certainty is not a prerequisite to recovery if there was any impact, however slight or harmless.[11] Moreover, medical testimony is not binding on a jury,[12] and it is the plaintiff's burden to prove causation by a preponderance of the evidence.[13] The court recognized the fallacy of the impact - no impact distinction, stating:

> It appears completely inconsistent to argue that the medical profession is absolutely unable to establish a causal connection in the case where there is no impact at all, but that the slightest impact . . . suddenly bestows upon our medical colleagues the knowledge and facility to diagnose the causal connection between emotional states and physi-

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9. 436 Pa. at 405, 261 A.2d at 86.

10. *Id.* at 406-08, 261 A.2d at 86-87, stating:

> The logical invalidity of this objection to medical proof can be demonstrated further by noting that the rule has *only* been applied where there is absolutely no impact whatsoever. Once there is even the slightest impact, it has been held that the plaintiff can recover for any damages which resulted from the accompanying fright, even though the impact *had no causal connection* with the fright-induced injuries. The rule has been stated: "However, where, as here, a plaintiff sustains bodily injuries, *even though trivial* or minor in character, which are accompanied by fright or mental suffering directly traceable to the peril in which the defendant's negligence placed the plaintiff, then mental suffering is a legitimate element of damages." *Potare v. City of Philadelphia*, 380 Pa. 581, 589, 112 A.2d 100, 104 (1955).
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> . . . .
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> . . . There is no reason to believe that the causal connection involved here is any more difficult for lawyers to prove or for judges and jurors to comprehend than many others which occur elsewhere in the law. "We realize that there may be difficulties in determining the existence of a causal connection between fright and subsequent physical injury and in measuring the extent of such injury. However, the problem of tracing a causal connection from negligence to injury is not peculiar to cases without impact and occurs in all types of litigation . . . in any event, difficulty of proof should not bar the plaintiff from the opportunity of attempting to convince the trier of fact of the truth of her claim." *Falzone v. Busch*, 45 N.J. 559, 566, 241 A.2d 12, 15-16 (1965). We recognize the recent view of the New Jersey Supreme Court as representative of current jurisprudence.

11. *See*, e.g., Porter v. Delaware, L. & W. R.R., 73 N.J.L. 405, 63 A. 860 (1906) (dust in the eye); Jones v. Brooklyn R.R., 23 App. Div. 141, 48 N.Y.S. 914 (1897) (miscarriage after small light bulb fell on plaintiff's head); Hess v. Philadelphia Transp. Co., 358 Pa. 144, 56 A.2d 89 (1948) (electrical shock). *See also* Christy Bros. Circus v. Turnage, 38 Ga. App. 581, 144 S.E. 680 (1928), the case of immemorial delight to law students, where a horse "evacuated his bowels" into the plaintiff's lap.

12. *See, e.g.*, Hughes v. Texas Eastern Transm. Corp., 298 F. Supp. 1381 (W.D. Pa. 1969).

13. *See, e.g.*, Auerbach v. Philadelphia Transp. Co., 421 Pa. 594, 221 A.2d 163 (1966); Gottlob v. Hillegas, 195 Pa. Super. 453, 171 A.2d 868 (1961) (upholding a jury's award of $100 after plaintiff presented over $5500 in medical expenses claimed to have resulted from the accident).

> cal injuries. It can easily be urged that recent advances in medical sciences have bestowed this ability upon physicians; but it is illogical to argue that the presence of some slight injury has accomplished the same effect![14]

Even Chief Justice Bell in his dissent[15] was unable to provide any validity for the medical certainty argument. After describing many instances where a person might reasonably fear for his safety, he stated:

> In most cases, it would be impossible for medical science to prove that these subjective symptoms could or could not possibly have resulted from or been aggravated or precipitated by fright or nervous shock or nervous tension or emotional disturbance or distress, each of which can in turn produce an ulcer or headaches or fainting spells or, under some circumstances, a heart attack, or a serious disease or other injurious results. Medical science, I repeat, could not prove but *could only guess* whether these could or could not have been caused or precipitated or aggravated by defendant's alleged negligent act.[16]

There is a major weakness in the Chief Justice's reasoning. Medical science *can* prove the injury was a result of the act. A properly qualified medical expert may give his opinion whereby the plaintiff can support his burden of proof. In this regard, the dissent is not so much in favor of the impact rule as it is against the indefiniteness of causation in injury claims in general. This, however, is the precise problem encountered routinely in claims for aggravation of a preexisting arthritic condition, herniated disc, etc. Had there been an impact, yet the heart attack not occurred until even weeks later, a plaintiff would have an opportunity to prove his case no matter how uncertain the medical evidence.[17] Therefore, the court properly concluded that the medical certainty argument has no place in modern personal injury litigation.

The second reason previously given in support of the impact rule was "the fear of fictitious injuries and fraudulent claims."[18] This is really just another way of stating the medical certainty argument. The court rejected this fear stating that the danger was no greater in no-impact cases than in cases where there is impact and that the judicial process has proven able to cope with the problem.[19] Bell's dissent in this regard merely relied on the

14. 436 Pa. at 407, 261 A.2d at 87.
15. *Id.* at 413, 261 A.2d at 90.
16. *Id.* at 419, 261 A.2d at 93 (dissenting opinion).
17. *See* Polando v. Blue Ridge Transp. Co., 374 Pa. 480, 97 A.2d 828 (1953); Gottlob v. Hillegas, 195 Pa. Super. 453, 171 A.2d 868 (1961).
18. 436 Pa. at 408, 261 A.2d at 87.
19. *Id.* at 409, 261 A.2d at 88:

statement from *Huston v. Freemansburg Borough*:[20]

> It requires but a brief judicial experience to be convinced of the large proportion of exaggeration and even of actual fraud in the ordinary action for physical injuries from negligence, and if we opened the door to this new invention the result would be great danger, if not disaster to the cause of practical justice. . . .[21]

The majority adequately dispensed with this argument in quoting from a Delaware case, *Robb v. Pennsylvania R.R.*,[22] " 'Public policy requires the courts, with the aid of the legal and medical professions, to find ways and means to solve satisfactorily the problems thus presented - not expedient ways to avoid them.' "[23]

The Pandora's box argument was the final proposition in support of the impact rule considered by the court. This theory was rejected on two grounds. First, said the court, the flood of litigation has not occurred in other states.[24] "Secondly . . . any such increase should not be determinative or relevant to the availability of a judicial forum for the adjudication of impartial individual rights."[25]

True to form, in his dissent, Chief Justice Bell relied heavily on stare decisis.[26] He listed five exceptions to the application of this principle,[27] the last of which was,

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> The charge that fraudulent claims will arise is not unique to this Commonwealth. Every court that has been confronted with a challenge to its impact rule has been threatened with the ominous spectre that an avalanche of unwarranted, trumped-up, false and otherwise unmeritorious claims would suddenly cascade upon the courts of the jurisdiction. The virtually unanimous response has been that (1) the danger of illusory claims in this area is no greater than in cases where impact occurs and that (2) our courts have proven that any protection against such fraudulent claims is contained within the system itself—in the integrity of our judicial process, the knowledge of expert witnesses, the concern of juries and the safeguards of our evidentiary standards.

20. 212 Pa. 548, 550-51, 61 A. 1022, 1023 (1905).

21. 436 Pa. at 416-17, 261 A.2d at 91 (dissenting opinion) (Emphasis omitted).

22. 210 A.2d 709, 714 (Del. 1965).

23. 436 Pa. at 411, 261 A.2d at 88-89.

24. *Id.*

25. *Id.* at 412, 261 A.2d at 89.

26. The dissenting opinion stated:

> I would hold that the principle of Stare Decisis should always be applied, *irrespective of the changing personnel of this (or any Supreme) Court* . . . . Change of circumstances or modern circumstances does not mean, nor has it ever heretofore been considered as the equivalent of change of personnel in the Court. . . .

Id. at 421, 261 A.2d at 93-94. In Knaub v. Gotwalt, 422 Pa. 267, 220 A.2d 646 (1966), the court denied recovery on the basis of the impact rule. Justices Jones, Eagen, O'Brien and Cohen joined C.J. Bell in his opinion. Justices Roberts and Musmanno dissented. In the present case, Jones, Eagen, O'Brien, Cohen, Roberts and Pomeroy lined up against the Chief Justice. Of the six who decided *Knaub*, only one, Chief Justice Bell, was in favor of retaining the impact rule. The "changing personnel" consisted of one new member.

27. The first four exceptions were stated as:

(1) where the Supreme Court of Pennsylvania is convinced that

> in those rare cases where the Supreme Court is convinced that the reason for the law undoubtedly no longer exists, and modern circumstances and Justice combine to require or justify a change, and no one's present personal rights or vested property interests will be injured by the change.[28]

This is precisely the reason the majority decided to abolish the impact rule. In summation of its opinion the court stated:

> We have carefully examined the arguments in support of the old impact rule. It seems clear to us that even if these rationales may have had validity in earlier years . . . continued adherence to the rule makes little sense. We believe that our analysis of the underpinnings of the impact doctrine proves that they are now so weak and that the arguments opposing the doctrine are so strong that an overruling of earlier cases is compelled.[29]

As a result of *Niederman v. Brodsky*, Pennsylvania has joined a very definite majority of states which now require no impact to recover for an injury.[30] Only eleven states currently invoke the

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prior decisions of the Court are irreconcilable; or (2) the application of a rule or principle has undoubtedly created great confusion; or (3) a rule of law has been only fluctuatingly applied; or (4) to correct a misconception in an occasional decision. . . .

436 Pa. at 421, 261 A.2d at 94.

28. *Id.* (Italics omitted).

29. *Id.* at 413, 261 A.2d at 89-90.

30. *See* Sahuc v. United States Fidel. & Guar. Co., 320 F.2d 18 (5th Cir. 1963) (*aff'g* dismissal by E.D. La.); Belt v. St. Louis - S.F. Ry., 195 F.2d 241 (10th Cir. 1952) (*rev'g* judgment n.o.v. by E.D. Okla.); Rogers v. Hexol, Inc., 218 F. Supp. 453 (D. Ore. 1962); Central of Georgia Ry. v. Kimber, 212 Ala. 102, 101 So. 827 (1924); Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963); Westesen v. Olathe State Bank, 78 Colo. 217, 240 P. 689 (1925); Strazza v. McKittrick, 146 Conn. 714, 156 A.2d 149 (1959); Robb v. Pennsylvania R.R., 210 A.2d 709 (Del. 1965); Usry v. Small, 103 Ga. App. 144, 118 S.E.2d 719 (1961); Clemm v. Atchison, T. & S.F. Ry., 126 Kan. 181, 268 P. 103 (1928); Bowman v. Williams, 164 Md. 397, 165 A. 182 (1933); Okrina v. Midwestern Corp., 282 Minn. 400, 165 N.W.2d 259 (1969); Kelly v. Lowney & Williams, 113 Mont. 385, 126 P.2d 486 (1942); Rasmussen v. Benson, 135 Neb. 232, 280 N.W. 890 (1938); Cote v. Litawa, 96 N.H. 174, 71 A.2d 792 (1950); Falzone v. Busch, 45 N.J. 559, 214 A.2d 12 (1965); Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961); Crews v. Provident Finance Co., 271 N.C. 684, 157 S.E.2d 381 (1967); Held v. Red Malcuit, Inc., 12 Ohio Misc. 158, 230 N.E.2d 674 (C.P. 1967) (but injury must be an immediate, sudden reaction to fright); Simone v. Rhode Island Co., 28 R.I. 186, 66 A. 202 (1907); Mack v. South Bound Ry., 52 S.C. 323, 29 S.E. 905 (1898); Sternhagen v. Kozel, 40 S.D. 396, 167 N.W. 398 (1918); Trent v. Barrows, 55 Tenn. App. 182, 397 S.W.2d 409 (1965); Kaufman v. Miller, 405 S.W.2d 820 (Tex. Civ. App. 1966); Savard v. Cody Chevrolet, 126 Vt. 405, 234 A.2d 656 (1967); Cherry v. General Petroleum Corp., 172 Wash. 688, 21 P.2d 520 (1933); Lambert v. Brewster, 97 W. Va. 124, 125 S.E. 244 (1924); Colla v. Mandella, 1 Wis. 2d 594, 85 N.W.2d 345 (1957).

impact rule.[31] In his dissenting opinion in *Knaub v. Gotwalt*,[32] the late Justice Musmanno had a valid point in this regard when he stated:

> It is a matter of infinite regret to me that in the train if Progress in the Law of Humanity, Pennsylvania is a car frequently clattering close to the caboose instead of cheerfully gliding over the rails immediately behind the locomotive.[33]

Knaub, however, was not the appropriate case in which to repudiate the impact rule. There, the plaintiffs were the parents and sister who witnessed a boy who was struck by the defendant's car and impaled on a picket fence. Tragic as the scene must have been, the plaintiffs alleged no significant physical injuries other than nausea and illness. More importantly, they were not in a position to fear for their own safety.[34] Therefore, while the decision was based on the impact rule,[35] to have permitted recovery would have been unprecedented in the American courts.[36] California in 1968 was the first state to permit recovery for damages sustained by a plaintiff who feared only for the safety of another.[37]

To clarify any confusion that might arise from *Niederman*, the court specifically held:

> We today choose to abandon the requirement of a physical impact as a precondition to recovery for damages proximately caused by the tort in only those cases like the one before us where the plaintiff was in personal danger of physical impact because of the direction of a negligent force against him and where plaintiff actually did fear the physical impact.[38]

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31. Beaty v. Buckeye Fabric Finishing Co., 179 F. Supp. 688 (E.D. Ark. 1959); Hoitt v. Lee's Propane Gas Serv., 182 So. 2d 58 (Fla. App. 1966); West Chicago St. Ry. v. Liebig, 79 Ill. App. 567 (1899); Boston v. Chesapeake & O. R.R., 223 Ind. 425, 61 N.E.2d 326 (1945); Kramer v. Rickemeier, 159 Iowa 48, 139 N.W. 1091 (1913); Kentucky Traction & Terminal Co. v. Rowman, 232 Ky. 285, 23 S.W.2d 272 (1930); Herrick v. Evening Exp. Pub. Co., 120 Me. 138, 113 A. 16 (1921); Kisiel v. Holyoke St. Ry., 240 Mass. 29, 132 N.E. 622 (1921); Alexander v. Pacholek, 222 Mich. 157, 192 N.W. 652 (1923) (but Manie v. Matson Oldsmobile-Cadillac Co., 378 Mich. 650, 148 N.W.2d 779 (1967) implied the rule would not be followed in view of the weight of authority); McCardle v. George B. Peck Dry Goods Co., 191 Mo. App. 263, 177 S.W. 1095 (1915); Bowles v. May, 159 Va. 419, 166 S.E. 550 (1932).

32. 422 Pa. 267, 220 A.2d 646 (1966).

33. *Id.* at 273, 220 A.2d at 648.

34. While the parents were seated in their car about twenty-five feet away, it should be noted that the sister was only about three feet from the boy at impact.

35. 422 Pa. at 270-72, 220 A.2d at 647-48.

36. 73 DICK. L. REV. 350, 352 (1969); *see, e.g.*, Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935).

37. Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968), *overruling* Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963); *accord*, RESTATEMENT (SECOND) OF TORTS § 436(3) (1965); *cf.*, Hambrook v. Stokes Bros., [1925] 1 K.B. 141.

38. 436 Pa. at 413, 261 A.2d at 90.

It should be recognized that this language is rather narrow. The court did not encompass an area in its new rule much beyond the facts of the case. Three elements appear necessary for recovery: (1) the plaintiff must be in personal danger of impact, (2) there must be a negligent force directed at him, and (3) he must actually fear the impact. This specifically excludes any claim arising out of fear for a third person as was present in *Knaub*. It would, however, include any near-miss situation such as *Bosley v. Andrews*,[39] where the plaintiff was chased by the defendant's bull. The *Niederman* court relied heavily on *Robb v. Pennsylvania R.R.*,[40] *Falzone v. Busch*[41] and *Battalla v. State*[42] from surrounding jurisdictions. Both *Robb* and *Falzone* fit nicely into the holding of the present case. In the former, the plaintiff narrowly escaped as the defendant's locomotive collided with her automobile, which was stalled on the tracks. In *Falzone*, the plaintiff alleged the defendant's car struck her husband and, in doing so, came so close to her as to put her in fear of her own safety. Both plaintiffs had resulting physical illness requiring medical attention.

Battalla, however, presented a different situation. The minor plaintiff was placed on a chair lift by one of the defendant's employees who failed to properly secure the safety belt. The plaintiff became hysterical and suffered consequential injuries. There was no danger of impact, unless it was with the ground, and there was no negligent force directed against him. Although the stated holding of *Niederman* does not conform to this factual situation, the reasons for permitting recovery are essentially the same. Therefore, the abrogation of the impact rule will probably be extended to cases not specifically involving threatened force and impact.[43]

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39. 393 Pa. 161, 142 A.2d 263 (1958).

40. 210 A.2d 709 (Del. 1965).

41. 45 N.J. 559, 214 A.2d 12 (1965), *overruling* Ward v. West Jersey & S. R.R., 65 N.J.L. 383, 47 A. 561 (1900).

42. 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961), *overruling* Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896). *Robb*, *Falzone* and *Battalla* were cited a total of eighteen times by the Pennsylvania Supreme Court in *Niederman*.

43. The recent cases from other jurisdictions have no express requirement of force and fear of impact, per se. Falzone v. Busch, 45 N.J. 559, 214 A.2d 12 (1965) held:

> We hold, therefore, that where negligence causes fright from a reasonable fear of immediate personal injury, which fright is adequately demonstrated to have resulted in substantial bodily injury or sickness, the injured person may recover if such bodily injury or sickness would be regarded as proper elements of damage had they occurred as a consequence of direct physical injury rather than fright. Of course, where fright does not cause *substantial* bodily injury or sickness, it is to be regarded as too lack-

There may be a situation not intended, but actually covered by the holding. What if the plaintiff had not feared for his own safety, but for the safety of his son who was struck? This is the "zone of danger" concept which has a line of non-Pennsylvania cases that grant recovery.[44] It is interesting to note that in the present case, the complaint did not mention fear or fright.[45] It merely stated the car skidded onto the sidewalk where the plaintiff was standing and struck the son. The Pennsylvania Supreme Court apparently *assumed* that the plaintiff feared for his own safety when it held that he had a valid cause of action.[46] Therefore, it is possible that the Pennsylvania Supreme Court will never have to decide whether one "in the zone of danger" fearing for the safety of another may recover. It appears that the prudent plaintiff should plead the objective facts to show his proximity to the occurrence and omit the subjective fact of fear. In the event, however, that the plaintiff in the present case does not prove he "actually did fear the physical impact," the court may have another opportunity to answer this question.

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ing in seriousness and too speculative to warrant the imposition of liability.

Id. at 570, 214 A.2d at 17; *accord*, Robb v. Pennsylvania R.R., 210 A.2d 709, 714-15 (Del. 1965); Savard v. Cody Chevrolet, 126 Vt. 405, 414, 234 A.2d 656, 660 (1967).

44. *See* Bowman v. Williams, 264 Md. 397, 165 A. 182 (1933); *cf.*, Hopper v. United States, 244 F. Supp. 314 (D. Colo. 1965); Cosgrove v. Beymer, 244 F. Supp. 824 (D. Del. 1965); Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963); Orlo v. Connecticut Co., 128 Conn. 231, 21 A.2d 402 (1941); Resavage v. Davis, 199 Md. 479, 86 A.2d 879 (1952); Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935).

45. 436 Pa. at 402, 261 A.2d at 84.

46. The court stated:

Since appellant's complaint alleges facts which if proven will establish that the negligent force was aimed at him and put him in personal danger of physical impact, and that he actually did fear the force, this case must proceed to trial.

Id. at 413, 261 A.2d at 90.

EXHUMATION AND AUTOPSY—JURISDICTION BY COMMON PLEAS COURT, CRIMINAL DIVISION; RIGHT OF DECEASED'S PARENT TO OBJECT

Kopechne Petition, 59 Luz. Leg. Reg. Reports 213, 47 Pa. D. & C. 2d 579 (C.P. 1969).

In *Kopechne Petition*,[1] the Common Pleas Court of Luzerne County, Pennsylvania, denied a motion to dismiss entered by the deceased's parents against a petition filed by the district attorney of the Southern District of Massachusetts and medical examiner of Dukes County, Massachusetts for the exhumation of the body of Mary Jo Kopechne, buried in Luzerne County, Pennsylvania, for the purpose of autopsy in Massachusetts where deceased had died. The motion to dismiss specified four reasons: (1) that the Common Pleas Court of Luzerne County, Criminal Division, did not have the jurisdiction and authority to grant the relief prayed for by petitioner;[2] (2) that the petition constituted a collateral attack upon the legal determination of the associate medical examiner of Dukes County, Massachusetts, "whereas in law such a legal determination, made in one sovereign state, cannot be collaterally attacked in another sovereign state;"[3] (3) that the right to conduct an autopsy in pursuance of a criminal investigation is a "right created by statute, and there is no statutory authority which would give a Pennsylvania court jurisdiction or authority to order an autopsy in the present manner;"[4] and (4) that petitioner did not sufficiently set forth facts which justify the requested relief.[5]

The court dismissed the first three reasons entered by the parents but sustained the fourth.[6] However, the petition itself was not dismissed, but rather, the petitioners were granted twenty days in which to file an amended petition.[7] In a subsequent hear-

1. 59 Luz. Leg. Reg. Reports 213, 47 Pa. D. & C.2d 579 (C.P. 1969).
2. *Id.* at 215, 47 Pa. D. & C.2d at 581.
3. *Id.* at 216, 47 Pa. D. & C.2d at 583.
4. *Id.* at 217, 47 Pa. D. & C.2d at 583.
5. *Id.* at 218, 47 Pa. D. & C.2d at 584.
6. *Id.* at 220, 47 Pa. D. & C.2d at 587.
7. *Id.* An amended petition was filed by the petitioners and on October 9, 1969, there was a second hearing on a second motion to dismiss by the Kopechnes, this time directing their objections to the amended petition. *In re* Kopechne (No. 2), 59 Luz. Leg. Reg. Reports 233 (C.P. Pa. 1969). The court dismissed the objection stating that the allegations of fact in the amended petition were sufficient to hold a hearing on the petition for exhumation and autopsy.

ing on the amended petition,[8] the court held that the facts presented were insufficient to uphold the petition for exhumation and autopsy, sustained the fourth reason originally advanced by the Kopechnes, and dismissed the petition.[9]

This leads the court to the conclusion that while we are not adjudging at this time that an exhumation and autopsy should be allowed, a hearing should be held in order to allow petitioner to prove the allegations of the amended petition and for the Kopechnes to exercise their prerogatives. . . .

Id. at 236.

The allegations in the amended petition included the following:

(5B) A determination by Doctor Mills that the death of Mary Jo Kopechne was caused by asphyxiation from immersion . . . ; that the cause of death was determined without benefit of autopsy; that Doctor Mills did not perform an autopsy because he found no external signs of violence or foul play; that the body of the deceased had been submerged eight hours before his observation; that it was assumed Mary Jo Kopechne was not only the driver of the car, but was its sole occupant. . . .

(5C) That the operator of the motor vehicle in which the deceased's body was found did not report the accident to the police until approximately ten hours after he said it occurred . . . that there is a witness who claims to have seen the car at 12:40 A.M. on July 19, 1969, with two or possibly three persons in it.

(5D) That said operator pleaded guilty to a motor vehicle law infraction.

(5E) That the report of the accident made to the Chief of Police of Edgartown, Massachusetts by the operator . . . differed from a report of the accident broadcast by the operator on July 25, 1969.

(5F) That the broadcast and police reports are silent on many important details of the accident and events surrounding it.

(5G) That persons who were not directly involved in the accident but who were cognizant of it, did not call the authorities.

(5I) That there appeared on the white shirt worn by the deceased "washed out" stains that give a positive benzidine reaction, an indication of the presence of resident traces of blood.

(5J) That there was present a certain amount of blood in both the deceased's mouth and nose which may or may not be inconsistent with death by drowning.

(5K) That the information in paragraphs 5I and 5J was not available to petitioners until after interment.

Id. at 235.

8. 59 Luz. Leg. Reg. Reports 295 (C.P. Pa. 1969).

9. *Id.* at 304. This Note will discuss the September 2, 1969 hearing upon the motion to dismiss by the Kopechnes and the law cited therein. There were no citations of authority in the opinion dismissing the petition. The latter opinion is summarized as follows:

The court enunciated a five point criterion in law for exhumation and autopsy:

1. Must be reasonable under the circumstances.
2. Its purpose is to elicit the truth in the promotion of justice.
3. It must be clearly established that:
   (a) good cause and
   (b) urgent necessity
   for such action exist.
4. There must be a strong showing that the facts sought will be established by an exhumation and autopsy.
5. That the law will reach into the grave in:
   (a) only the rarest of cases, and
   (b) not even then, unless clearly necessary, and
   (c) where there is a reasonable probability that such a violation of the sepulcher will establish that which is sought.

Id. at 298.

The court then proceeded to examine the facts from two viewpoints: (1) from a legal viewpoint as they "pertain to the eliciting of truth in

Concerning the first Kopechne objection as to the jurisdiction and authority of the Court of Common Pleas of Luzerne County, Criminal Division,[10] the court emphasized that there was no disagreement as to the jurisdiction of the Common Pleas Court of Luzerne County,[11] but rather, the issue concerned the authority and jurisdiction of the Criminal Division.

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the promotion of justice and the good cause and urgent necessity that must exist to warrant an exhumation and autopsy," *i.e.*, whether such facts exist as would cause one in authority to conclude that the deceased died from a cause other than drowning; and (2) from the medical-legal aspect that "there must be a strong showing that the facts sought will be established by an autopsy and the reasonable probability that the violation of the sepulcher will establish that which is sought," *i.e.*, whether there is a reasonable probability that the autopsy will establish any criminal cause of death. *Id.*

Concerning the first issue, the court found that there were no facts of record that could objectively cause one to conclude that a reasonable probability exists that the cause of death was other than death by drowning. *Id.* at 299.

The court stated the following concerning the second issue:

> In evaluating (the) medical testimony as it relates to the law of the Commonwealth of Pennsylvania, it must be concluded that the petitioners have failed to meet their burden of proof by a "strong showing that the facts sought will be established by an exhumation and autopsy" and that there is a "reasonable probability" that that which is sought warrants a violation of the sepulcher. A fortiori . . . every reasonable probability leads to a conclusion that supports the original finding of the cause of death of Mary Jo Kopechne, asphyxiation by immersion.

Id. at 303. This finding was based on: (1) the testimony of three pathologists for the petitioners whose testimonies were inconvincing as to the probability of the finding of conclusive evidence contra to a determination of death by drowning; (2) the testimony of the medical examiner of Dukes County, Massachusetts who after examination of the deceased's body had issued the death certificate; and (3) the fact that after his examination the associate medical examiner released the body to the mortician with a caveat that there should be no embalming until there was a clearance issued by the district attorney's office and the state police which evidently was later issued. *Id.* at 301 *et seq.*

The court gave the following weight to the objections of the deceased's parents to the exhumation:

> In view of the testimony and law considered herein, and bearing in mind that courts are not reluctant to grant autopsies in given cases, we must be mindful that Joseph A. Kopechne and Gwen L. Kopechne, the parents of Mary Jo Kopechne, have indicated that they are unalterably opposed to exhumation and autopsy. Thus, it is incumbent that this court give weight to their objections. While their disapproval is not an absolute bar to an exhumation and autopsy, in view of the facts presented to this court, their objections are well taken.

Id. at 304.

10. *See* note 2 and accompanying text *supra*. *See generally* 25 C.J.S. *Dead Bodies* § 4 (1966) and P. JACKSON, THE LAW OF CADAVERS 106 (2d ed. 1950), as to the jurisdiction of a court of equity over exhumation and autopsy.

11. 59 Luz. Leg. Reg. Reports at 215, 47 Pa. D. & C.2d 582.

> Under certain circumstances, disinterment of the body of deceased for evidentiary purposes may be ordered in civil cases.
>
> Assuming the authority of the court to order the disinterment of a body for evidential purposes in a civil case, where property rights only are involved, it could not be reasonably argued that the court did not possess a like power in criminal cases where liberty and even life itself may be involved.[12]

The court cited *State v. Wood*[13] in which the Supreme Court of Maine upheld the right of an accused murderer to have the deceased exhumed and an autopsy held even though a partial autopsy had been taken immediately after death.[14] In *Kopechne*, there had not been even a partial autopsy. Although the petition in *Kopechne* did not name a criminal defendant or even state that a crime had been committed, the court stated:

> [it] is brought in the name of the District Attorney in and for the Southern District of Massachusetts and the Medical Examiner in and for Dukes County, Massachusetts inquiring into the facts surrounding the death. . . . This certainly suggests that the inquiry here is of a criminal rather than a civil nature.[15]

Criminal jurisdiction was, therefore, upheld.

The second objection advanced by the Kopechnes[16] referred to a copy of the Massachusetts record of death stating the cause as asphyxiation by immersion and the deposition of the associate medical examiner who had made the determination of death.[17] The court summarily dismissed the objection that the petition constituted a collateral attack upon a legal determination made in one sovereign state which cannot be attacked in another sovereign state on the ground that the petition did not dispute the associate medical examiner's findings.[18] In Pennsylvania and Massachusetts a medical examiner's findings are considered a legal determination.[19]

> [T]his court does not know the intention of the Massachusetts authorities in this regard, or what proofs will be offered at the hearing. Accordingly, this court cannot

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12. *Id.*
13. 127 Me. 197, 142 A. 728 (1928).
14. *Id.* at 200,
> The fact that a partial and unsatisfactory autopsy had . . . prior to the filing of the petition in this case, been made by the medical examiner . . . in no way effects the authority of the court to comply with the petitioner's request.

15. 59 Luz. Leg. Reg. Reports at 216, 47 Pa. D. & C.2d at 582. *See also* Commonwealth v. Grether, 204 Pa. 203, 53 A. 753 (1902); *In re* Brobst, 70 Pa. D. & C. 257 (C.P. Clearfield Co. 1950).
16. *See* note 3 and accompanying text *supra.*
17. 59 Luz. Leg. Reg. Reports at 216, 47 Pa. D. & C.2d at 583.
18. *Id.*
19. *See* Marvin v. Monroe County, 154 Pa. Super. 75 (1943); MASS. GEN. LAWS ch. 38, § 6 (1932). *See generally* 18 C.J.S. Coroners § 12 (1939), concerning the judicial authority of a coroner or medical examiner.

> speculate as to a possible collateral attack on [the associate medical examiner's] determination, and therefore it cannot be considered at this time.[20]

It seems that this issue could have been decided either way. The amended petition stated that the "public interest and proper administration of justice requires confirmation of Doctor Mill's original determination of the cause of death which can be accomplished only by an autopsy."[21] Surely, this could equally indicate that the intent of the petitioner was to prove a cause of death contra to Doctor Mill's determination. If the petitioner did not believe the possibility that the medical examiner's findings were incorrect, there would have been no reason for the hearing.

The third reason advanced for the motion to dismiss concerned whether or not the right to conduct an autopsy is solely a right created by statute.[22] The position taken by the petitioners and upheld by the court was that a court's action in ordering an autopsy and exhumation is an inherent right of the state.[23] "Any other theory of law, any different course of conduct on the part of the court would cause judicial proceedings to receive and merit the contempt of all right-thinking citizens."[24]

In *Roberts v. State*,[25] a prosecution for murder, the Supreme Court of Mississippi held that it was not necessary that the accused be made a party to and given notice of the petition of the district attorney for the exhumation and autopsy of the deceased because: (1) the accused was not a parent of the deceased, and (2) the accused was not the owner of the plot of ground in which the deceased was buried.[26] The court continued:

> Autopsies are sometimes essential to the protection of health and the discovery of crime. In such a case, the welfare of society demands that the state or its authorized rep-presentative be permitted to conduct an examination by dissection if necessary without reference to the wishes of the relatives of the dead.[27]

The interpretation given this case by the *Kopechne* court results in the following proposition: A relative of the deceased, other than his parents, has no standing to protect an exhumation and autopsy, but even the parents' protest will not be recognized if public policy

20. 59 Luz. Leg. Reg. Reports at 216, 47 Pa. D. & C.2d at 583.
21. *See* note 7 and accompanying text *supra*.
22. *See* note 4 and accompanying text *supra*.
23. 59 Luz. Leg. Reg. Reports at 217, 47 Pa. D. & C.2d at 584.
24. State v. Wood, 127 Me. 197, 200, 142 A. 728, 730 (1928).
25. 210 Miss. 777, 50 So. 2d 356 (1951).
26. 210 Miss. at 784, 50 So. 2d at 362.
27. *Id.* at 786, 50 So. 2d at 363.

and justice requires a further look into the causes of the deceased's demise. The *Roberts* court also addressed itself to the defendant's contention that allowing an exhumation and autopsy violated sections of the Mississippi criminal statutes.[28] It held that such statutes refer only to the wanton and criminal disturbance of interred bodies, or graves, for the purposes of stealing therefrom, and for private gain, and not to exhumation for the public good.[29] Although the *Kopechne* court did not address itself to the problem, it would seem that this matter would apply to the first objection concerning the authority and jurisdiction of the common pleas court, criminal division. However, on the logic of the *Roberts* decision, a review of this matter by the court would have made no difference in the outcome of the hearing.

The fourth Kopechne objection relating to the insufficiency of the facts to justify relief[30] was upheld by the court.[31] In their petition for exhumation and autopsy, petitioners had alleged: (1) that there was a pending inquest in Dukes County, Massachusetts; (2) that the deceased was buried in Luzerne County, Pennsylvania; (3) that the purpose of the inquest was to determine whether or not there is any reason sufficient to believe that the deceased's sudden death may have resulted from the act or negligence of person or persons other than the deceased; and (4) that so as the circumstances of death be clearly established and the doubt and suspicion surrounding death be resolved, an exhumation and autopsy will be required.[32] In their brief, petitioners argued that "the fact that an inquest is being held is sufficient fact alone to justify the autopsy."[33] In opposition to this contention, the court again addressed itself to the consideration which must be given to the parents' wishes.

> A pending inquest in another jurisdiction does not afford this court the opportunity of weighing the right of the parents to have their daughter's corpse remain undisturbed as against the public interest in the administration of justice. The Kopechnes may have no standing at the inquest, but most certainly can exercise their right to be heard at the exhumation and autopsy proceedings.[34]

The court noted an inconsistency in the argument that an inquest automatically warrants an autopsy. First, under the law the judge must exercise his discretion in deciding whether or not to grant an exhumation and autopsy;[35] "the district attorney's contention

28. *Id.* Pennsylvania has a similar statute applying to the desecration of dead bodies. See PA. STAT. ANN. tit. 16, §§ 1237, 1238 (1936).
29. 210 Miss. at 786, 50 So. 2d at 363.
30. *See* note 5 and accompanying text *supra.*
31. *See* notes 6-7 and accompanying text *supra.*
32. 59 Luz. Leg. Reg. Reports at 218, 47 Pa. D. & C.2d at 585.
33. *Id.*
34. *Id.*
35. 59 Luz. Leg. Reg. Reports at 219, 47 Pa. D. & C.2d at 586. It is assumed here that the court is referring back to its earlier reference to the

would deny the court the exercise of this discretion."[36] Secondly, "it is conceded by the Massachusetts authorities that the parents are entitled to notice of the autopsy proceedings, a fortiori, they requested in their prayer for relief that the parents be notified."[37] If petitioners' argument concerning the automatic granting of an autopsy is followed, any notice given the parents would serve no useful purpose.[38]

As a final point, contra to petitioners' contentions, the court refused to take judicial notice of "the events surrounding the death and the doubt and suspicion which exist."[39]

> The court, along with millions of other individuals, has read and heard of the events of the death of Mary Jo Kopechne, but this cannot be substituted for allegations of fact in a judicial proceeding.[40]

On this particular point, the court *could* have attempted to expand the bounds of judicial notice but instead chose the more conservative approach in what seems to be an attempt to emphasize the court's impartiality in this politically "loaded" case.

The petitioners were given twenty days in which to file an amended petition in which sufficient facts to justify the exhumation and autopsy would be set forth.[41] In a third hearing on the matter and in an opinion which cited no legal authority, the amended petition was held to not set forth sufficient grounds for the exhumation and autopsy.[42]

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inherent right of the court to consider the public interest and what could be gained by an autopsy as weighed against any private interests involved.

36. 59 Luz. Leg. Reg. Reports at 219, 47 Pa. D. & C.2d at 586.

37. *Id.*

38. *See* Commonwealth v. Marshall, 287 Pa. 512, 530, 135 A. 301, 307 (1926), where the Pennsylvania supreme court said:

> Without reciting the averments of the petition and answer, it is sufficient to say, the former did not state facts which imperatively required that its prayer be granted, and, when the averments of the answer are taken into consideration, the matter appears as one entirely for the discretion of the trial tribunal. The petition fails to disclose what it was proposed to develop through an autopsy more than had already been shown by the examination of the body made by the coroner's physician. Moreover, it does not appear that any notice was given to the near relatives of the deceased of the application to exhume her body; and this, in itself, would be sufficient to warrant the order made by the court below.

See also Commonwealth v. Buzard, 365 Pa. 511, 76 A.2d 394 (1950); Commonwealth v. Chalfa, 313 Pa. 175, 169 A. 564 (1933).

39. 59 Luz. Leg. Reg. Reports at 219, 47 Pa. D. & C.2d at 586.

40. *Id.*

41. *Id.* at 220, 47 Pa. D. & C.2d at 587.

42. *See* notes 7-9 and accompanying text *supra.*

MENTAL HEALTH—EQUITY COURT AUTHORIZATION OF KIDNEY TRANSPLANT FROM INCOMPETENT TO DYING BROTHER

Strunk v. Strunk, 445 S.W.2d 145 (Ky. 1969).

Jerry Strunk, twenty-seven years of age, had an IQ corresponding to that of a six-year-old. He was adjudged, through proper legal proceedings, mentally incompetent and committed to a state institution for the feeble-minded. His brother, Tommy, age twenty-eight, had contracted a fatal kidney disease. Futile efforts were made among the rest of the family to find a donor who had the blood type and tissue structure necessary for a kidney transplant. As a last resort, Jerry was tested and found to be highly acceptable. The mother, as a committee, petitioned the county court for authority to proceed with a kidney transplant from Jerry to Tommy. The county court allowed the petition, basing their decision on the testimony of the attending psychiatrist to the effect that the transplant would be beneficial to Jerry, as he was dependent on Tommy emotionally and psychologically. Jerry's guardian ad litem appealed to the circuit court which affirmed on the basis of the testimony of the psychiatrist and the amicus curiae brief submitted by the Department of Mental Health. An appeal was taken to the Kentucky Court of Appeals.

In a 4-3 decision, the court held that equity had the power to permit a kidney transplant from an incompetent ward of the state to his brother who was dying of a kidney disease.[1] The majority justified its holding on two grounds. First, equity has the inherent power to act in regard to incompetents and ". . . the chancellor has the power to deal with the estate of the incompetent in the same manner as the incompetent would if he had his faculties."[2] This rule is known as the doctrine of substituted judgment.[3] Second, equity may act despite the statutory delegation of duties to the committees for incompetents and jurisdiction to the county courts. The Kentucky statute[4] restricted the committee to activi-

1. Strunk v. Strunk, 445 S.W.2d 145 (Ky. 1969).
2. *Id.* at 147.
3. *E.g.*, *In re* Earl of Carysfort, 41 Eng. Rep. 418 (Ch. 1840); *Ex parte* Whitebread, 35 Eng. Rep. 878 (Ch. 1816); *In re* Willoughby, 11 Paige 257 (N.Y. 1844); *see* Annot., 24 A.L.R.3d 863 (1969); Annot., 3 A.L.R.3d 18 (1965); 27 AM. JUR. 2, *Equity* § 69 (1966).
4. KY. REV. STAT. ANN. §§ 387.060, 387.210 (1969).

ties that would preserve the property of the incompetent and vested jurisdiction in matters regarding incompetents to the county courts. The majority held, however, that the statute did not divest the authority from the appellate court to review the county court.[5] In *Polivick v. Polivick*,[6] the Kentucky Court of Appeals had commented on the right of the appellate court to reverse a county court: "Change in allowance for alimony is subject to be reviewed by the chancellor at any time that a change of conditions may necessitate."[7]

The dissent in *Strunk*[8] presented three principal arguments. First, it contended that the limited power and authority vested in the committee should determine the restrictions on the right of equity to act. It looked first to the statute, which provided that the committee "shall have the custody of his ward, and the possession, care and management of the ward's property, real and personal."[9] Case law further defines the duties of the committee. In the election for, or in behalf of, a mental incompetent under or against a will, courts have held the committee must choose that which benefits the incompetent.[10] The dissent felt this "benefit" test should be strictly construed in light of the statute.[11] In *Baker v. Thomas*,[12] a decision cited by the dissent, the court held: "The statute does not contemplate that the committee of a lunatic may exercise any other power than to have the possession, care and management of the lunatic's or incompetent's estate."[13] While

5. Strunk v. Strunk, 445 S.W.2d 145, 148 (Ky. 1969).

6. 259 Ky. 653, 83 S.W.2d 8 (1935). *Accord*, Thomasson v. Thomasson, 310 Ky. 234, 219 S.W.2d 957 (1949); Arms' Committee v. Arms, 260 Ky. 634, 86 S.W.2d 542 (1935); Casebier v. Casebier, 193 Ky. 490, 236 S.W. 966 (1921); Dalton v. Dalton, 172 Ky. 585, 189 S.W. 902 (1916); Pearl v. M'Dowell, 26 Ky. 658 (1830).

7. Polivick v. Polivick, 259 Ky. 653, 655, 83 S.W.2d 8, 11 (1935).

8. 445 S.W.2d 145 (Ky. 1969) (dissenting opinion).

9. KY. REV. STAT. ANN. § 387.060 (1969).

10. *E.g., In re* Estate of Klekunas, 205 N.E.2d 497 (Ill. App. 1965); Ramsey's Ex'r v. Ramsey, 243 Ky. 202, 47 S.W.2d 1059 (1932); Harding v. Harding, 140 Ky. 277, 130 S.W. 1098 (1910); *In re* Brown, 212 App. Div. 677, 209 N.Y.S. 288, *aff'd*, 240 N.Y. 646, 148 N.E. 742 (1925); *In re* Peden's Estate, 409 Pa. 194, 185 A.2d 794 (1962); Gerlach's Estate, 127 Pa. Super. 293, 193 A. 467 (1937).

11. Strunk v. Strunk, 445 S.W.2d 145, 149 (Ky. 1969) (dissenting opinion).

12. 272 Ky. 605, 114 S.W.2d 1113 (1938).

13. *Id.* at 606, 114 S.W.2d at 1114. *See also* McCreary v. Billing, 176 Ala. 314, 58 So. 311 (1912); Richards v. East Tennessee U. & G.R.R.R., 106 Ga. 614, 33 S.E. 193 (1899); Grattan v. Grattan, 18 Ill. 167 (1856); Townsend v. Kendall, 4 Minn. 412 (1860); Deal v. Wachovia Bank & Trust Co., 218 N.C. 483, 11 S.E.2d 464 (1940); Latta v. General Assembly of Presbyterian Church, 213 N.C. 462, 196 S.E. 862 (1938).

it is conceded that case law dictates that the committee is to be restricted to its statutory powers, it is submitted that the dissent has not established a lack of power to act.

The second argument of the dissent is in the form of an *arguendo*. Even if the court allowed the doctrine of substituted judgment to be applied, the petitioner has not "conclusively demonstrated"[14] that the operation would be beneficial to the incompetent. The dissent rejects the expert testimony of the attending psychiatrist and the opinion of the Department of Mental Health when it states:

> It is common knowledge beyond dispute that the loss of a close relative or friend to a six-year-old child is not of major impact. Opinions concerning psychological trauma are at best most nebulous. Furthermore there are no guarantees that the transplant will become a surgical success, it being well known that body rejection of transplanted organs is frequent. The life of the incompetent is not in danger, but the surgical procedure advocates some peril.[15]

It is submitted the dissent erred in concluding the "benefit" test had not been satisfied. There is no doubt that the operation would create a hazard to the incompetent, but the petitioner presented substantial evidence to show the transplant would be beneficial to the incompetent donor.[16]

The final contention of the dissent is that "consent is a prerequisite to the donation of a part of the human body."[17] The only appellate court case which contains a discussion of the issue of consent in circumstances somewhat similar to the case at bar is *Bonner v. Moran*.[18] A fifteen-year-old boy permitted a physician to take skin grafts from his side and legs for his severely burned cousin. The mother knew nothing of the operation at the time the first grafts were taken. The Circuit Court of the District of Columbia held the consent of the child was ineffective to prevent liability on the doctor for a battery:

> But in all cases the basic consideration is whether the proposed operation is for the benefit of the child and is done with the purpose of saving his life or limb. The circumstances are wholly without the compass of any of these exceptions. Here the operation was entirely for the benefit of another and involved sacrifice on the part of the infant of fully two months of schooling, in addition to serious pain and possible results affecting his future life.[19]

The appellate court in *Bonner* reversed the lower court and re-

14. Strunk v. Strunk, 445 S.W.2d 145, 151 (Ky. 1969) (dissenting opinion).
15. *Id.* at 150 (dissenting opinion).
16. *Id.* at 146-47.
17. *Id.* at 150 (dissenting opinion).
18. 126 F.2d 121 (D.C. Cir. 1941).
19. *Id.* at 123.

manded for a new trial, but implied that the actions of the mother in the two month period may have amounted to ratification or consent by implication.

The defendant in the *Bonner* case relied on *Bakker v. Welsh*[20] and the *Restatement of Torts* in his argument that, if the minor is capable of understanding the effect of the operation, his consent thereto should be valid.[21] The *Bonner* court rejected this reasoning. In *Bakker v. Welsh*,[22] a seventeen-year-old boy, who lived on a farm with his father, developed a tumor on his ear. On the advice of his father he traveled to the city where a surgeon concluded that the tumor should be removed. The boy returned to the farm and later went back to the city where his aunt and two other adults consented to the operation and the use of a general anesthetic. The boy died during the operation from a reaction to the anesthetic, and the father sued the surgeon and the anesthetist. The Michigan Supeme Crout held the defendants were not liable for the death of the boy, as he was fully aware of the risks involved in the operation. The court, in commenting on the lack of express consent on the part of the father, said, "There is nothing in the record to indicate that, if the consent of the father had been asked, it would not have been freely given."[23]

Section 59 of the *Restatement of Torts* proposes a rule consistent with the *Bakker* case:

> If a person whose interest is invaded is at the time by reason of his youth or defective mental condition, whether permanent or temporary, incapable of understanding or appreciating the consequences of the invasion, the assent of such person to the invasion thereto is not effective as a consent thereto.[24]

Stated conversely, the argument of the *Restatement* is that, if a person is capable of understanding or appreciating the consequences of the invasion, his assent thereto is effective as consent. This approach seems to focus on the application of a test after the fact. It looks at the facts as they existed at the time of the invasion to determine whether the defendant afterward should be held liable. The doctrine of substituted judgment, on the other hand, suggests a means to discern liability before the invasion occurs. It is submitted that either of these positions represents a better-reasoned approach to the problem of consent in the field of medicine than

20. 144 Mich. 632, 108 N.W. 94 (1906).
21. Bonner v. Moran, 126 F.2d 121, 122 (D.C. Cir. 1941).
22. 144 Mich. 632, 108 N.W. 94 (1906).
23. *Id.* at 634, 108 N.W. at 96.
24. RESTATEMENT OF TORTS § 59 (1934).

the *Bonner*[25] decision or the minority view in *Strunk*.[26]

A survey of case law shows that courts have extended the scope of application of the doctrine of substituted judgment. In *Ex parte Whitebread*,[27] the decision which established the doctrine, the wife and children of an incompetent were permitted to use funds from the considerable estate of the incompetent for their education and support. The rationale for the holding was:

> The principle that it would be more agreeable to the lunatic, and more to his advantage, that they should receive an education and maintenance suitable to his condition, than that they should be sent into the world to disgrace him as beggars.[28]

Another decision, *In re Earl of Carysfort*,[29] applied the doctrine of substituted judgment to persons outside the family of the incompetent by allowing an annuity to be taken from the income of a lunatic's estate to provide a retirement pension for a personal servant of the lunatic. The court felt ". . . the allowance was one which the lunatic, if he should ever recover, would approve. . . ."[30]

The first case to apply the doctrine of substituted judgment in America was *In re Willoughby*,[31] which held that a step-daughter was not entitled to payment from the estate of the incompetent. The court stated that where the person petitioning for the allowance had a legal claim to the estate of the incompetent, the allowance was to be in the form of an advance which could later be deducted from the amount inherited at the death of the incompetent. The court, in disallowing the petition, established two important guidelines for future cases. It found initially that it must be "perfectly certain" how the lunatic would act ". . . considering the heavy charges to which his estate has been and may hereafter be subjected in consequence of the proceedings."[32] The court also indicated the need of the potential recipient and the wishes of the incompetent, if possible, should be established by substantial evidence.[33]

In recent years, courts have been willing to substitute their judgment in cases involving possible loss of life. Where Jehovah's Witnesses refused to consent to blood transfusions, appellate courts intervened and ordered the transfusions to prevent the deaths of the patients.[34] A law review article written over ten years ago[35]

25. 126 F.2d 121 (D.C. Cir. 1941). See text accompanying note 17 *supra*.
26. 445 S.W.2d 145 (Ky. 1969). See text accompanying note 16 *supra*.
27. 35 Eng. Rep. 878 (Ch. 1816).
28. *Id.* at 879.
29. 41 Eng. Rep. 418 (Ch. 1840).
30. *Id.*
31. 11 Paige 257 (N.Y. 1844).
32. *Id.* at 260.
33. *Id.* at 261.
34. *In re* Georgetown College, Inc., 31 F.2d 1000 (D.C. Cir. 1964), *cert.*

contained a discussion of three Massachusetts cases on the trial level which allowed transplants from minors to their twins dying of kidney diseases.[36] In each case the court relied on the testimony of the psychiatrist that there would be "grave emotional impact" if the twin died, and of the donor that he understood and accepted the risks of the operation. The author of the article presented, but did not attempt to answer, the issue raised by having an incompetent donor.[37]

The Kentucky Court of Appeals in *Strunk v. Strunk*[38] faced a unique fact situation, distinguishable from the cases discussed above. In the case at bar, the potential donor was an incompetent hardly able to communicate, his family had consented to and petitioned for the operation, and expert evidence was introduced to show that, under the circumstances, the donor would benefit from the transplant. It is submitted that the majority properly concluded that these factors justified its application of the equitable doctrine of substituted judgment in this novel situation.

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denied, 377 U.S. 978 (1964); United States v. George, 239 F. Supp. 752 (D. Conn. 1965); *see* Trout, *Blood Transfusions*, 73 DICK. L. REV. 201 (1969).

35. Curren, *A Problem of Consent: Kidney Transplant in Minors*, 34 N.Y.U. L. REV. 891 (1959).

36. Foster v. Harrison, Equity No. 68674 (Mass. Sup. Jud. Ct. Nov. 20, 1957); Huskey v. Harrison, Equity No. 68666 (Mass. Sup. Jud. Ct. Aug. 30, 1957); Masden v. Harrison, Equity No. 68651 (Mass. Sup. Jud. Ct. June 12, 1957).

37. Curren, *A Problem of Consent: Kidney Transplant in Minors*, 34 N.Y.U. L. REV. 891, 895-96 (1959).

38. 445 S.W.2d 145 (Ky. 1969).

ARMED FORCES—NONRESIDENT SERVICEMEN NOT EXEMPT FROM STATE SALES AND USE TAXES

United States v. Sullivan, 395 U.S. 169 (1969).

Section 514 of the Soldiers' and Sailors' Civil Relief Act[1] grants a measure of immunity from state taxation to servicemen stationed in a state other than their state of domicile. The extent of this immunity is the subject matter of the decision of the United States Supreme Court in *United States v. Sullivan*.[2] The United States, in its capacity as a plaintiff representative of militay personnel, brought suit against Connecticut tax officials for a declaratory judgment that section 514 prevents Connecticut from collecting sales and use taxes fro mnonresident servicemen. The United States District Court for the District of Connecticut entered the requested declaratory judgment in favor of the United States.[3] The

1. Soldiers' and Sailors' Civil Relief Act § 514, 50 U.S.C. APP. § 574 (1964) [hereinafter referred to as Section 514], provides in part as follows:

> (1) For the purposes of taxation in respect of any person, or of his personal property, income, or gross income by any State, . . . such person shall not be deemed to have lost a residence or domicile in any State, . . . solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, . . . any other State, . . . while and solely by reason of being, so absent. For the purpose of taxation in respect of the personal property . . . of any such person [nonresident serviceman] by any State . . . of which such person is not a resident or in which he is not domiciled, [(a)] compensation for military or naval service shall not be deemed income for services performed within, or from sources within such State [station state] . . . and [(b)] [his] personal property shall not be deemed to be located or present in or to have a situs for taxation in such State. . . . Where the owner of personal property is absent from his resident or domicile solely by reason of compliance with military or naval orders, this section applies with respect to personal property, or the use thereof, within any tax jurisdiction [his station state] other than such place of residence or domicile, regardless of where the owner may be serving in compliance with such orders: *Provided*, That nothing contained in this section shall prevent taxation by any State . . . in respect of personal property used in or arising from a trade or business, if it otherwise has jurisdiction. . . .
>
> (2) When used in this section, (a) the term "personal property" shall include tangible and intangible property (including motor vehicles), and (b) the term "taxation" shall include but not be limited to licenses, fees, or excises imposed in respect to motor vehicles or the use thereof: *Provided*, That the license, fee, or excise required by the State . . . of which the person is a resident or in which he is domiciled has been paid.

2. 395 U.S. 169 (1969).

3. United States v. Sullivan, 270 F. Supp. 236 (D. Conn. 1967), *aff'd*, 398 F.2d 672 (2d Cir. 1968), *rev'd*, 295 U.S. 169 (1969).

Court of Appeals for the Second Circuit affirmed.[4] The United States Supreme Court reversed, expressing the unanimous view that the exemption contained in section 514 did not apply to state sales or use taxes.[5]

Connecticut, as do most states, levies a broad pattern of sales and use taxes on retail sales of tangible personal property.[6] Under the sales tax, retailers are required to pay the state 3½% of gross receipts on goods subject to the tax.[7] The retailers are entitled to reimbursement of this tax from their customers.[8] The Connecticut use tax is similar to most state use taxes in that it is imposed upon the use or other consumption of property within Connecticut, when the user has not paid a sales tax in Connecticut or elsewhere.[9] The proceeds of the sales and use taxes are to be allocated and expended only for public health, welfare, and educational purposes.[10] Section 514 of the Soldiers and Sailors Civil Relief Act provides in pertinent part as follows:

> (1) . . . For the purposes of taxation *in respect of* personal property . . . of any such person [nonresident serviceman] by any State . . . of which such person is not a resident or in which such person is not domiciled . . . [his] personal property shall not be deemed to be located or present in or to have a situs for taxation in such State. . . .[11]

This statutory setting raises the issue of whether sales and use taxes are included by the words "taxation in respect of personal property" found in section 514.

Two Supreme Court cases have had a great impact on the meaning of the words "taxation in respect of personal property" and therefore will be discussed before analyzing the Court's opinion in *Sullivan*. In *Dameron v. Brodhead*,[12] a state levied an ad valorum personal property tax on the personal property of a nonresident serviceman. The host state argued that since the serviceman's state of domicile had not taxed the property, section 514 did not bar the tax for there was no possibility of double taxation. The

4. United States v. Sullivan, 398 F.2d 672 (2d Cir. 1968), *rev'd*, 395 U.S. 169 (1969).
5. United States v. Sullivan, 395 U.S. 169 (1969).
6. CONN. GEN. STAT. ANN. §§ 12-406-32(a) (1958).
7. CONN. GEN. STAT. ANN. § 12-408(1) (1958).
8. CONN. GEN. STAT. ANN. § 12-411 (1958).
9. CONN. GEN. STAT. ANN. § 12-432 (1958).
10. *Id.*
11. Soldiers' and Sailors' Civil Relief Act § 514, 50 U.S.C. APP. § 574 (1964) (emphasis added). The full provision of § 574 is quoted in note 1 *supra*.
12. 345 U.S. 322 (1953).

Supreme Court rejected this argument, holding that a nonresident serviceman's immunity from a tangible personal property tax levied by his station state adhered even though the serviceman had not paid a tax upon his property in his home state. The Court explained that,

> Though the evils of potential multiple taxation may have given rise to this provision [section 514] Congress appears to have chosen the *broader technique of the statute carefully*, freeing servicemen from both income and property taxes imposed by a state by virtue of their presence there as a result of military orders.[13]

Thus, it appears that *Dameron* did not restrict the statute's purpose and effect to those types of taxes which would result in double taxation.

The Court in *California v. Buzard*[14] was faced with the problem of interpreting the following language of subsection (2)(b) of section 514: "the term taxation shall include but not be limited to licenses, fees, or excises imposed in respect to motor vehicles or the use thereof."[15] The Court held that if the nonresident serviceman does not pay his domicile state's license, fee, or excise imposed in respect to his motor vehicle or the use thereof, the station state can impose such a tax but ". . . only to the extent that these taxes are essential to the functioning of the station state's licensing and registration laws in their application to the motor vehicles of nonresident servicemen."[16] The Court in *Buzard* also considered that the over all purpose of section 514 was to free nonresident servicemen from taxes which defray the general expenses of the government of the host state.[17]

United State v. Sullivan begins with a separate discussion of sales taxes. The Court first recognizes that section 514 refers to taxes "in respect of" personal property rather than simply "on" personal property which is the usual way of referring only to ad valorem personal property taxes. However, the Court goes on to state that "it would be an overly strained construction to say that taxation of the sales transaction itself is the same as taxation in respect of personal property."[18] It would seem that this is a mere conclusion by the Court with no reasoning to support it. In fact, it appears that the Court did not give any weight to the plain meaning of the words "taxation in respect of personal property" in deciding whether there was an overly strained construction of the phrase. Some common definitions of the phrase "in respect of" include

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13. *Id.* at 326 [emphasis added].
14. 382 U.S. 386 (1966).
15. Soldiers' and Sailors' Civil Relief Act § 514, 50 U.S.C. APP. § 574 (1964).
16. *Id.* at 393.
17. *Id.* at 395.
18. 395 U.S. 169, 175 (1969).

in relation to,[19] arising out of,[20] and with reference to.[21] These definitions lead to the conclusion that for a tax to be encompassed by the phrase "in respect of personal property," the tax must have a relation to, refer to, or arise out of personal property. Since it is necessary to refer to the sales price of the personal property to impose both sales and use taxes, a sound contention can be made that "taxation in respect of personal property" includes sales and use taxes. Since this phrase is the heart of the issue in *Sullivan*, it is submitted that the Court should have considered the usual or plain meaning of the language when deciding that the phrase was being overly strained to apply to a particular type of tax.

The *Sullivan* Court next relies on the silence of Congress to support its decision, reasoning that "if Congress had intended to exclude sales and use taxes it would not have employed language so poorly suited to that purpose as taxation in respect of personal property."[22] The fundamental weakness of such an argument is apparent. As the Second Circuit in its opinion in *Sullivan* pointed out, inferences can be drawn either way from an argument based on silence.[23] By not explicitly enumerating sales and use taxes and other types of taxes, Congress could have intended the words "taxation in respect of personal property" to be broad enough to deter states from enacting taxes which would relate to a nonresident serviceman's personal property but would not be a sales or use tax and therefore would not be covered by the exemption of section 514. The silence doctrine can also support the conclusion that section 514 covers sales and use taxes based on the reasoning used by the Second Circuit in its opinion in *Sullivan*. That court suggested that if Congress had wanted to allow state sales and use taxes on nonresident servicemen, it would have logically said so in the provision which allows nonresident servicemen's personal property to be taxed if it is used or arises from a trade or business.[24]

Although the Supreme Court concedes that use taxes are not so clearly excluded by the language of section 514, as are sales taxes, the Court relies on the legislative history of the 1942 enactment of the Soldiers & Sailors Civil Relief Act[25] and the 1944[26]

19. Chicago Title & Trust Co. v. United States, 45 F. Supp. 323, 326 (N.D. Ill. 1941).
20. Commissioner v. Alta Mines, Inc., 139 F.2d 580, 582 (10th Cir. 1943).
21. WEBSTER'S NEW 20TH CENTURY DICTIONARY 1542 (2nd Ed. 1964).
22. 395 U.S. 169, 176 (1969).
23. 398 F.2d 673, 677 (2d Cir. 1968).
24. *Id.*
25. Act of Oct. 6, 1942, ch. 581, § 17, 56 Stat. 777.
26. Act of July 3, 1944, ch. 397, § 1, 58 Stat. 722.

and 1962[27] amendments of that act to prove that the words "taxation in respect of personal property" exempt only annually recurring ad valorem taxes on personal property. The Court refers to statements in the legislative history which refer to "servicemen having their property taxed by more than one state within same calendar year."[28] The Court then reasons that the language of these reports shows that the purpose of section 514 is to prevent multiple state taxation of the property of servicemen and therefore does not apply to sales or use taxes which are imposed only where there has been a retail sales transaction.[29] This announced purpose of section 514 seems to run counter to the Supreme Court's decision in *Dameron v. Brodhead.*[30] But the Court sidesteps *Brodhead* by impliedly reasoning that although the purpose of section 514 is broad enough to cover situations where there is no danger of multiple state taxation, as in *Brodhead*, "the *predominant* legislative purpose [prevention of multiple state taxation] remains highly relevant in determining the scope of the exemption."[31] The Court then concludes that "the absence of any significant risk of double taxation under state sales and use taxes is strong evidence of congressional intent not to include them in section 514."[32] The Court's adoption in *Sullivan* of a *predominant* legislative purpose of section 514 rather than an application of *all* the legislative purposes of section 514, as it apparently did in *Brodhead*, seems unfounded and, as a result, merely a device used to achieve a predetermined result.

The next obstacle the *Sullivan* Court meets is the statement made by Mr. Justice Brennan in his opinion for a unanimous Court is *California v. Buzard.*[33] The *Sullivan* Court states quite succinctly what it considers to be its holding in *Buzard*:

> [s]ubsection (2) (b) of section 514 does not encompass ordinary revenue-raising excise or use taxes, but is limited to those taxes which are essential to the functioning of the host State's licensing and registration laws in their application to the motor vehicles of nonresident servicemen.[34]

Since *California v. Buzard* only interpreted subsection (2)(b) of section 514 involving motor vehicle registration fees, the holding of that case would involve only that subsection of section 514. But in analyzing the Court's opinion in *Buzard*, it appears that Mr Justice Brennan did expressly consider the overall purpose of section 514 and for a unanimous Court stated that this purpose was

27. Act of Oct. 9, 1962, Pub. L. No. 87-771, 76 Stat. 768.
28. S. REP. No. 1558, 77th Cong., 2d Sess. 11 (1942); H.R. REP. No. 2198, 77th Cong., 2d Sess. 6 (1942).
29. 395 U.S. 169, 177 (1969).
30. See note 12 and accompanying text *supra.*
31. 395 U.S. 169, 177 (1969).
32. 395 U.S. 169, 180 (1969).
33. 382 U.S. 386, 393, 395 (1966).
34. 395 U.S. 169, 182 (1969).

"to free nonresident servicemen from the burden of taxes which defray the general expenses of government."[35] Both the district and circuit courts in *Sullivan* relied heavily on this statement reasoning that the Connecticut sales and use taxes were taxes which defrayed the general expenses of government[36] and therefore are within the purpose and exemption of section 514 as interpreted by the Supreme Court in *Buzard*.[37] In fact this dictum in *Buzard* concerning the purpose of section 514 in all likelihood was the impetus for the suit for declaratory judgment concerning the applicability of section 514 to state sales and use taxes.

Therefore, when the Supreme Court in *Sullivan* states that subsection (2) (b) of section 514 does not encompass ordinary revenue-raising excise or use taxes, it approves of the strict holding of Buzard. However, the *Sullivan* Court refuses to recognize and does not attempt to explain the dictum in *Buzard* to the effect that section 514 was enacted to free nonresident servicemen from the burden of taxes which seek to defray the general expenses of government.

The definite retreat in *Sullivan* from the spirit of both the *Dameron* and *Buzard* cases can best be explained by looking at the policy factors present in *Sullivan*. The Supreme Court notes that 35 states filed briefs in this case in support of Connecticut's position.[38] The support by these states is understandable; loss of revenue, as well as significant administrative and accounting burdens which the states' retailers and tax officials would have to bear, would have resulted if the Supreme Court had held that section 514 applied to sales and use taxes. In addition, the Court probably considered the possibility of nonresident servicemen buying goods for persons not entitled to the sales and use tax exemption, with the result of receiving reimbursement from these persons who would thereby avoid state sales taxes. Still another policy factor considered by the Court is the fact that military personnel can purchase "all the necessities and many of the luxuries of life tax-free at military commissaries."[39]

It is submitted that the Court relied heavily on these policy

35. California v. Buzard, 382 U.S. 386, 393, 395 (1966) (dictum).
36. CONN. GEN. STAT. ANN. § 12-432 (1958): "All proceeds of the sales and use taxes shall be allocated to and expended for public health, welfare and education purposes only."
37. United States v. Sullivan, 398 F.2d 672, 679 (2d Cir. 1968), *rev'd*, 395 U.S. 169 (1969); United States v. Sullivan, 270 F. Supp. 236, 243 (D. Conn. 1967), *aff'd*, 398 F.2d 672 (2d Cir. 1968, *rev'd*, 395 U.S. 169 (1969)).
38. 395 U.S. 169, 171 (1969).
39. 395 U.S. 169, 179 (1969).

factors and simply decided that the best solution under the circumstances was to hold that section 514 did not include sales and use taxes. By so holding, the Supreme Court has not placed the burden of passing a law exempting servicemen from sales and use taxes on the proponents of such exemption.

EDWARD M. FEDOK

TORTS—NEW YORK CITY HOUSING AUTHORITY HELD LIABLE FOR FAILURE TO PROVIDE ADEQUATE POLICE PROTECTION

Bass v. City of New York, — Misc. 2d —, 305 N.Y.S.2d 801 (Sup. Ct. 1969).

In *Bass v. City of New York*[1] at the trial term of the Supreme Court of Kings County, Justice Samuel S. Leibowitz held the New York City Housing Authority,[2] as landlord of a privately sponsored and maintained housing project, liable for negligence in failing to provide an adequate police force to protect its tenants from molestation. Under the parties' agreed statement of facts, the project had a history of crime known to defendant Housing Authority which had pursuant to section 402 of the Public Housing Law[3] undertaken to organize and maintain its own police force.

Lourdes Bass, a nine year old girl, lived with her parents in Farragut Houses, a housing project owned and operated by the New York City Housing Authority. While on her way back to school at lunchtime Lourdes was seized near the rear entrance hall of the building by a resident of another building in the same project. She was taken to the roof of the building and raped. After momentarily escaping, she was again seized and dropped from the roof, fourteen stories above the courtyard; she died from the re-

1. — Misc. 2d —, 305 N.Y.S.2d 801 (Sup. Ct. 1969). Action was discontinued against the city leaving the New York City Housing Authority as defendant.

2. Created pursuant to PUBLIC HOUSING LAW § 400 (McKinney Supp. 1969).

3. The Public Housing Law provides:

> 5. . . . the New York City Housing Authority shall have the power in its discretion to provide and maintain a housing police department and a uniformed housing police force. Such department and force shall have the power and it shall be their duty, in and about housing facilities, to preserve the public peace, prevent crime, detect and arrest offenders, suppress riots, mobs and insurrections, disperse unlawful or dangerous assemblages and assemblages which obstruct free passage; protect the rights of persons and property; guard the public health; remove all nuisances; enforce and prevent violation of all laws and ordinances; and for these purposes to arrest all persons guilty of violating any law or ordinance. . . . Each member of such force shall be a peace officer as defined by section one hundred fifty-four of the code of criminal procedure and, while on duty, shall possess all the powers of a policeman of a city in the execution of criminal process; and criminal process issued by any court or magistrate of a city may be directed to and executed by a member of such force.

PUBLIC HOUSING LAW § 402 (McKinney Supp. 1969).

sultant injuries. At the time of the incident the only housing police officer assigned to the project was at lunch. The victim's father, as administrator of her estate, brought survival[4] and wrongful death actions.[5]

In finding the Housing Authority liable, Justice Leibowitz emphasized the facts that defendant had undertaken to maintain a protective police force, thereby lulling the tenants into a false sense of security and that the police force was inadequate to protect persons and property in the crime-ridden project. With no cases directly on point, the court relied heavily on basic tort law. The decision falls short of overruling the generally accepted rule that a municipal corporation, or an agency thereof, is not liable for its failure to provide police protection to an individual.[6] The result, however, was not predicated upon the tenuous distinctions between proprietary and governmental functions[7] or between misfeasance and nonfeasance of government agents.[8] Although the court emphasized a duty approach to the Housing Authority's obligations to the tenant, it conceded that defendant was not an insurer of the personal safety and property of its tenants. The court noted:

> But that simple proposition leaves open a host of situations which call for some reasonable measure of care and protection. I have no difficulty with the "reasonable" care mandated by tort law, which the situation here called for. At the time of the occurrence, there was none.[9]

Section 8 of the Court of Claims Act waives governmental immunity in New York and provides:

> § 8. Waiver of immunity from liability
>
> The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court

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4. ESTATES, POWERS AND TRUSTS LAW § 11-3.2 (McKinney 1967).

5. ESTATES, POWERS AND TRUSTS LAW § 5-4.1 (McKinney 1967).

6. Riss v. City of New York, 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S. 2d 897 (1968); Motyka v. City of Amsterdam, 15 N.Y.2d 134, 204 N.E.2d 635, 256 N.Y.S.2d 595 (1965); Steitz v. City of Beacon, 295 N.Y. 51, 64 N.E.2d 704 (1945); Moch Co. v. Renssalaer Water Co., 247 N.Y. 160, 159 N.E. 896 (1928); Scott v. City of New York, 2 App. Div. 2d 854, 155 N.Y.S.2d 787 (1956); Murrain v. Wilson Line, 270 App. Div. 372, 59 N.Y.S.2d 750 (1946); New York City Housing Authority v. Jackson, 58 Misc. 2d 847, 296 N.Y.S.2d 237 (Civ. Ct. 1968); Jones v. City of Herkimer, 51 Misc. 2d 130, 272 N.Y.S.2d 925 (Sup. Ct. 1966); Libertella v. Maenza, 21 Misc. 2d 317, 191 N.Y.S.2d 191 (Sup. Ct. 1959).

7. *See* Riss v. City of New York, 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968); Murrain v. Wilson Line, 270 App. Div. 372, 59 N.Y.S. 2d 750 (1946).

8. *See* Schuster v. City of New York, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958); Meistinsky v. City of New York, 309 N.Y. 998, 132 N.E.2d 900 (1956); McCrink v. City of New York, 296 N.Y. 99, 71 N.E.2d 419 (1947).

9. Bass v. City of New York, — Misc. 2d —, 305 N.Y.S.2d 801, 806 (Sup. Ct. 1969).

> against individuals or corporations, provided the claimant complies with the limitations of this article.[10]

The waiver has been extended to subdivisions of the state.[11] The cases arising under section 8 have left a confusing history of liability in New York.[12] Recovery has been denied by the general rule that municipalities have no duty to provide adequate police or fire protection.[13] Recovery has also been denied by the policy consideration that extension of municipal liability would impose a crushing financial burden on the city.[14] Further, since the organization and deployment of police forces is considered a legislative-administrative matter involving allocation of municipal resources, courts are powerless to substitute their judgment for the administrative decisions of other branches of government.[15] Thus, relief has been denied where an accident resulted from a failure of the police to prevent a driver from further operation of a vehicle in violation of the law,[16] where the fire department failed to take action against a known defective gas heater,[17] and where the police failed to protect a plaintiff at her request from her rejected suitor who had been terrorizing her for six months.[18]

To avoid the general rule that a municipality and its agencies

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10. COURT OF CLAIMS ACT § 8 (McKinney 1963).

11. Bernardine v. City of New York, 294 N.Y. 361, 62 N.E.2d 604 (1945), *aff'g*, 268 App. Div. 444, 51 N.Y.S.2d 888 (1944).

12. *See* cases cited notes 14-22 *infra.*

13. *See* cases cited note 6 *supra.* In Motyka v. City of Amsterdam, 15 N.Y.2d 134, 204 N.E.2d 635, 256 N.Y.S.2d 595 (1965), the court said liability arises from a statute only where disregard of the command of the statute results in damage to one of the class for whose especial benefit the statute has been enacted. Further, the city was not liable for a failure to supply general police or fire protection. Steitz v. City of Beacon, 295 N.Y. 51, 64 N.E.2d 704 (1945).

14. Riss v. City of New York, 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968); Steitz v. City of Beacon, 295 N.Y. 51, 64 N.E.2d 704 (1945). For one view of the effect of holding the municipality or its agency liable, see the dissenting opinion of Judge Keating in Riss v. City of New York, 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968).

15. Riss v. City of New York, 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S. 2d 897 (1968); Langer v. City of New York, 9 Misc. 2d 1002, 171 N.Y.S.2d 390 (1958), *aff'd*, 8 App. Div. 2d 709, 185 N.Y.S.2d 751 (1959); New York City Housing Authority v. Jackson, 58 Misc. 2d 847, 296 N.Y.S.2d 237 (Civ. Ct. 1968).

16. Libertella v. Maenza, 21 Misc. 2d 317, 191 N.Y.S.2d 191 (Sup. Ct. 1959).

17. Motyka v. City of Amsterdam, 15 N.Y.2d 134, 204 N.E.2d 635, 256 N.Y.S.2d 595 (1965). In Messineo v. City of Amsterdam, 17 N.Y.2d 523, 215 N.E.2d 163, 267 N.Y.S.2d 905 (1966), the court felt compelled to follow the Motyka case but called attention to the injustice of the rule and its incongruity under modern decisions.

18. Riss v. City of New York, 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S. 2d 897 (1968).

are not liable for furnishing an inadequate police force, some courts have found that a special relationship exists between the plaintiff and defendant municipality.[19] In *Schuster v. City of New York*,[20] the majority found the existence of a special relationship between the city acting through its police department and the plaintiff's intestate who had supplied the department with information leading to the arrest of Willie Sutton. Decedent's part in the arrest had been widely publicized. He was shot three weeks later. The court held that the special relationship gave rise to a special duty to use reasonable care for the protection of citizens who collaborate with the police once it reasonably appears they are in danger due to the collaboration. Liability was predicated upon the police department's failure to provide a bodyguard and its negligent assurance that the decedent was in no danger. In *Jones v. City of Herkimer*,[21] failure to protect plaintiff's decedent in the face of a long history of threats and assaults amounted to facts constituting liability. In addition, the courts have found the New York City Housing Authority liable for ineffectively enforcing rules it established when violation resulted in injury to children.[22]

In the *Bass* decision Justice Leibowitz distinguished the cases relied on by the Housing Authority. *New York City Housing Authority v. Jackson*[23] was technically a counterclaim of constructive eviction against a summary proceeding for nonpayment of rent. In *Riss v. City of New York*[24] the court distinguished governmental activities in private enterprise from those wholly within the public sector. In *Bass* the activity of the Housing Authority was entirely a private enterprise. The court further found that *Schuster v. City of New York*[25] was not at odds with plaintiff's position in *Bass* since the Housing Authority had assumed the burden of protection and later failed to fulfill its obligation.

The Bass court cited *Amoruso v. New York City Transit Authority*,[26] *Abbott v. New York Public Library*[27] and *Caldwell v. Village of Island Park*,[28] three cases in which liability was based on

19. Schuster v. City of New York, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958); Jones v. City of Herkimer, 51 Misc. 2d 130, 272 N.Y.S. 2d 925 (Sup. Ct. 1966).

20. 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958).

21. 51 Misc. 2d 130, 272 N.Y.S.2d 925 (Sup. Ct. 1966). *Compare* Riss v. City of New York, 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968), *with* Jones v. City of Herkimer, 51 Misc. 2d 130, 272 N.Y.S.2d 925 (Sup. Ct. 1966).

22. Geigel v. New York City Housing Authority, 17 App. Div. 2d 838, 233 N.Y.S.2d 257 (1962); DaRocha v. New York City Housing Authority, 109 N.Y.S.2d 263 (Sup. Ct. 1951). *See* Caldwell v. Village of Island Park, 304 N.Y. 268, 107 N.E.2d 441 (1952).

23. 58 Misc. 2d 847, 296 N.Y.S.2d 237 (Civ. Ct. 1968).

24. 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968).

25. 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958).

26. 12 App. Div. 2d 11, 207 N.Y.S.2d 855 (1960).

27. 263 App. Div. 314, 32 N.Y.S.2d 963 (1942).

28. 304 N.Y. 268, 107 N.E.2d 441 (1952).

a violation of the duty to use ordinary care to avoid foreseeable danger. Attention was also directed to *Goldberg v. Housing Authority of Newark*[29] in which the New Jersey Supreme Court held the Housing Authority of Newark not liable for its failure to provide police protection. The Newark Authority, however, had no statutory power to organize a police force as did the New York City Authority. It is submitted that the *Bass* court placed too much emphasis on the effect of the absence of that statute in the decision. The *Goldberg* majority stated that, even if a statute had existed giving the Authority power to organize a police force, the Housing Authority would not have been liable because the duty to provide police protection is governmental in nature, inevitably vague and ill suited to a landlord's capabilities.[30] Justice Leibowitz found the minority opinion[31] in *Goldberg* particularly persuasive in its call for liability based on the duty of a reasonably prudent person in the face of an unreasonable, foreseeable risk of harm

Housing authorities are normally charged with at least the same responsibilities as any other landlord.[32] The New York City Housing Authority, however, was given statutory powers[33] beyond that of other landlords. The justice stated:

> I firmly believe that a landlord of a privately sponsored and maintained housing complex such as this, with a similar history of crime and disorder, should bear a special responsibility to protect its residents from these lawless elements. How much greater then is that duty on the part of this defendant who was given the power, and which did in fact choose, to organize its own protective force who are vested with all authority of a regular police force? Having made this choice, it became its further obligation to provide this protection in adequate measure to reasonably secure its tenants against molestation in its own property.[34]

The court charged the Housing Authority at a minimum with a

29. 38 N.J. 578, 186 A.2d 291 (1962).

30. Goldberg v. Housing Authority of Newark, 38 N.J. 578, 591, 186 A.2d 291, 297-98 (1962).

31. *Id.* at 593, 186 A.2d at 299. (Dissenting opinion by Jacobs, J., Proctor and Schettino, JJ.).

32. *E.g.*, Goldberg v. Housing Authority of Newark, 38 N.J. 578, 186 A.2d 291 (1962); *see* 51C C.J.S. *Landlord and Tenant* § 297 (1968).

33. PUBLIC HOUSING LAW § 402 (McKinney Supp. 1969).

34. Bass v. City of New York, — Misc. 2d —, 305 N.Y.S.2d 801, 807 (Sup. Ct. 1969). *Contra*, New York City Housing Authority v. Jackson, 58 Misc. 2d 847, 296 N.Y.S.2d 237 (Civ. Ct. 1968), New York City Housing Authority v. Medlin, 57 Misc. 2d 145, 291 N.Y.S.2d 672 (Civ. Ct. 1968), Libertella v. Maenza, 21 Misc. 2d 317, 191 N.Y.S.2d 191 (Sup. Ct. 1959); RESTATEMENT (SECOND) OF TORTS § 323 (1965).

duty to call upon the New York City Police Department to furnish the protection it could not. This duty appears reasonable in light of a finding of fact that a tacit understanding existed between the police department and the Housing Authority that the city police would keep out of the project.[35]

Finally, Justice Leibowitz addressed himself to the issue of causation and found the lack of protection to have been a substantial factor in causing the injuries[36] because an adequate police force would have acted as a substantial deterrent to criminal activity. Further, the criminal activity of the child's killer was not a superseding, independent cause of the injury but was related to the defendant's total failure of supervision, protection and other reasonable precautions. The criminal's act was a foreseeable, intervening force.[37] The result is supported by the *Restatement (Second) of Torts*:

> §448. Intentionally Tortious or Criminal Acts Done Under Opportunity Afforded by Actor's Negligence
>
> The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.[38]
>
> §449. Tortious or Criminal Acts the Probability of Which Makes Actor's Conduct Negligent
>
> If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby.[39]

Without going deeply into the nature of governmental activities, the court found the Authority liable on fundamental tort principles:[40] voluntary assumption of a duty and a subsequent breach. The courts have found the Transit Authority,[41] the public library[42] and the city[43] liable for failure to provide police protection. It is submitted that under the circumstances of this case the Housing Authority was properly held to the same standards of care.

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35. *See also* Goldberg v. Housing Authority of Newark, 38 N.J. 578, 591, 186 A.2d 291, 298 (1962), State v. Smith, 37 N.J. 481, 181 A.2d 761 (1962).

36. Abbott v. New York Public Library, 263 App. Div. 314, 32 N.Y.S.2d 963 (1942); RESTATEMENT (SECOND) OF TORTS § 432 (1965).

37. DiSabato v. Soffes, 9 App. Div. 2d 297, 193 N.Y.S.2d 184 (1959); Matter of Guardian Casualty v. Wright, 253 App. Div. 360, 2 N.Y.S.2d 232 (1938); 38 AM. JUR. *Negligence* §§ 67, 71 (1941).

38. RESTATEMENT (SECOND) OF TORTS § 448 (1965).

39. RESTATEMENT (SECOND) OF TORTS § 449 (1965).

DECLARATORY JUDGMENTS—PENNSYLVANIA STILL CLINGS TO ITS "NO ALTERNATIVE REMEDIES" REQUIREMENT

C.H. Pitt Corp. v. Insurance Company of North America, 435 Pa. 381, 257 A.2d 857 (1969).

A doorman of the Carlton House Hotel was attempting to move a paraplegic's car when suddenly the car began accelerating backward at high speed. A collision abruptly terminated the car's backward progress. The startled doorman then attempted to ease the car forward, but again lost control of the car. This time the car began accelerating forward at high speed, and again its progress was halted by a collision. As a result of these collisions, several people were injured, four cars were damaged, and two lawsuits were brought against the C.H. Pitt Corporation (Pitt) as owner and operator of the Carlton House Hotel.

Pitt notified its insurance carrier, the Insurance Company of North America (I.N.A.), of the pending claims. I.N.A. denied coverage. Pitt then sought a declaratory judgment (1) that Pitt was entitled to coverage under the policy, and (2) that I.N.A. was obliged to defend Pitt in the pending lawsuits. I.N.A. contended that a declaratory proceeding would not lie. The trial court,[1] however, decided that:

> [T]he case at bar is precisely the type of case that the Declaratory Judgment Act[2] was intended for. The insurers of the Carlton House Hotel have raised a technical, legal question and denied defense and coverage. . . .
>
> In view of the technical involvement and the resultant potential multiplicity of trials, . . . the Court is drawn to the conclusion that the declaratory judgment procedure, under the fact situation as presented to this court, is proper. . . .[3]

Accordingly, the case was tried. Most of the facts were stipulated. At the conclusion of the trial, judgment was entered in favor of Pitt; I.N.A. appealed.

The Pennsylvania Supreme Court reversed,[4] holding that

1. C.H. Pitt Corp. v. Insurance Co. of North America, No. 3344 (C.P. Allegh., filed Nov. 2, 1966), *rev'd*, 435 Pa. 381, 257 A.2d 857 (1969).
2. Uniform Declaratory Judgments Act, PA. STAT. ANN. tit. 12, §§ 831-46 (1953).
3. Record at 90a-91a.
4. C.H. Pitt Corp. v. Insurance Co. of North America, 435 Pa. 381, 257 A.2d 857 (1969).

"[a] declaratory judgment proceeding should not be entertained if there exists another established and appropriate remedy."[5] The court was of the opinion that Pitt had the "adequate" alternative remedy of defending the lawsuits itself and then suing I.N.A. in assumpsit to recover any losses incurred.

In dissent,[6] Mr. Justice Roberts, joined by Mr. Justice Pomeroy, declared:

> It is an ongoing source of amazement to me that a majority of this Court can continue to ignore the *explicit language* of the Uniform Declaratory Judgments Act[7] . . . [which] provides in no uncertain terms that the availability of other relief, legal or equitable, "shall not debar a party from the privilege of obtaining a declaratory judgment or decree in any case where the other essentials to such relief are present. . . ."[8]

Justice Roberts concluded that the trial judge, in his discretion, *could* have refused to entertain the declaratory proceeding, but he was not *required* to do so.[9]

Pitt stands for the principle that a declaratory judgment will not lie if another remedy is available. In holding that the appropriateness of a declaratory proceeding depends on the absence of alternative remedies, *Pitt* does not depart from existing Pennsylvania law.[10] In fact, the significance of *Pitt* lies in its dogmatic adherence to this Pennsylvania "no alternative remedies" requirement. Significantly, this requirement has been repudiated by prevailing United States case law,[11] by leading commentators,[12] and apparently by the express language of the Uniform Declaratory Judgments Act.[13]

The soundness of the Pennsylvania "no alternative remedies" requirement must be examined with respect to the Uniform Declaratory Judgments Act and its legislative history in Pennsylvania.[14] In its original form, the Act permitted a court to refuse a declaratory judgment when such a judgment would not terminate

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5. *Id.* at 385, 257 A.2d at 860.
6. *Id.* at 386, 257 A.2d at 860.
7. PA. STAT. ANN. tit. 12, § 836 (1953).
8. C.H. Pitt Corp. v. Insurance Co. of North America, 435 Pa. 381, 386, 257 A.2d 857, 860 (1969) (dissenting opinion) (emphasis in original).
9. *Id.*
10. *See* cases cited note 29 *infra*; note 35 *infra*.
11. *See* 22 AM. JUR. 2d *Declaratory Judgments* § 14 (1965).
12. *See, e.g.*, 1 W. ANDERSON, ACTIONS FOR DECLARATORY JUDGMENTS § 195 (2d ed. 1951) [hereinafter cited as ANDERSON]; E. BORCHARD, DECLARATORY JUDGMENTS 315-46 (2d ed. 1941) [hereinafter cited as BORCHARD].
13. PA. STAT. ANN. tit. 12, § 836 (1953); see wording of the von Moschzisker amendment quoted in text accompanying note 23 *infra*, which is the current wording of the pertinent part of § 836.
14. For a detailed account of the Act's legislative history in Pennsylvania, see McWilliams v. McCabe, 406 Pa. 644, 659-61, 179 A.2d 222, 230 (1962) (concurring and dissenting opinion); *In re* Johnson's Estate, 403 Pa. 476, 480-88, 171 A.2d 518, 519-23 (1961); BORCHARD, *supra* note 12, at 318-25.

the controversy.[15] Confusion arose when an early case[16] interpreting the Act was misquoted.[17] As a result, the requirement that there must be no other "statutory" remedy available[18] was transformed into the requirement that there must be no other "equally serviceable" remedy available.[19] Eventually, a declaratory proceeding was deemed to be improper if *any* established legal or equitable remedy was available.[20]

In an attempt to restore the Act to its original meaning, and to align Pennsylvania with other jurisdictions interpreting the Uniform Declaratory Judgments Act,[21] Judge von Moschzisker[22] drafted an amendment which provided that:

> The mere fact that an actual or threatened controversy is susceptible of relief through a general common law remedy, or an equitable remedy, or an extraordinary legal remedy, whether such remedy is recognized or regulated by statute or not, shall not debar a party from the privilege of obtaining a declaratory judgment or decree in any case where the other essentials to such relief are present. . . .[23]

The von Moschzisker amendment was clear as originally written, but unfortunately an additional clause was appended before the amendment was enacted. The additional clause, in declaring "but the case is not ripe for relief by way of such common law remedy . . .",[24] caused considerable confusion. The Pennsylvania Supreme Court interpreted the amendment, in its final form, to mean that a declaratory judgment can never lie if the case *is* ripe for relief by way of another remedy, and that a case *is* ripe for such relief if another remedy is *available.*[25] This appears to be the precise result which Judge von Moschzisker had attempted to avoid, and arguably, at least, the supreme court misinterpreted the amendment.[26]

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15. Act of June 18, 1923, No. 321, § 6, [1923] Pa. Laws 840.
16. Kariher's Petition, 284 Pa. 455, 131 A. 265 (1925).
17. Leafgreen v. La Bar, 293 Pa. 263, 142 A. 224 (1928).
18. Kariher's Petition, 284 Pa. 455, 471, 131 A. 265, 271 (1925).
19. Leafgreen v. La Bar, 293 Pa. 263, 264, 142 A. 224, 224 (1928).
20. *See In re* Johnson's Estate, 403 Pa. 476, 480-81 n.4, 171 A.2d 518, 520 n.4 (1961).
21. *Id.* at 482, 171 A.2d at 521.
22. The former Chief Justice Robert von Moschzisker drafted the amendment after retiring from the Pennsylvania Supreme Court.
23. *In re* Johnson's Estate, 403 Pa. 476, 482-83, 171 A.2d 518, 521 (1961). In its final form the amendment was adopted in the Act of April 25, 1935, No. 33, § 1, [1935] Pa. Laws 72.
24. Act of April 25, 1935, No. 33, § 1, [1935] Pa. Laws 72.
25. *See* Stofflet v. Tillotson, 346 Pa. 574, 577, 31 A.2d 274, 275 (1943); Allegheny County v. Equitable Gas Co., 321 Pa. 127, 129, 183 A. 916, 917 (1936).
26. *See* BORCHARD, *supra* note 12, at 321-25.

By 1943 the Pennsylvania legislature was prompted to delete the troublesome "ripe for relief" phrase, leaving the amendment essentially in the same form as when it was originally written by Judge von Moschzisker.[27] The confusion, however, has remained.[28] Two groups of cases have emerged. One group supports the more restrictive view that a declaratory judgment will not lie if there is another "available", "appropriate", "adequate", or "established" remedy.[29] The other group supports the more liberal view that a declaratory judgment may be entertained even though a common law remedy is also available.[30] Typical of the more restrictive group of cases is *Bierkamp v. Rubinstein.*[31] In *Rubinstein,* the Pennsylvania Supreme Court concluded that "an action for declaratory judgment is not an optional substitute for established, available and appropriate remedies and should not be entertained if another available and appropriate remedy exists."[32] Typical of the

27. Act of May 26, 1943, No. 284, § 1, [1943] Pa. Laws 645, PA. STAT. ANN. tit. 12, § 836 (1953).

28. For an excellent discussion on the confusion in Pennsylvania regarding the effect of alternative remedies in declaratory judgment cases, *see* Note, *Section 6 of Pennsylvania's Uniform Declaratory Judgments Act,* 24 U. PITT. L. REV. 793, 799-802 (1963).

29. Bierkamp v. Rubinstein, 432 Pa. 89, 246 A.2d 654 (1968) (easement rights; "available and appropriate"); Mains v. Fulton, 423 Pa. 520, 224 A.2d 195 (1966) (easement rights; "available and appropriate"); Carlsson v. Pennsylvania Gen. Ins. Co., 417 Pa. 356, 207 A.2d 759 (1965) (liability insurance policy; "adequate"); Greenberg v. Blumberg, 416 Pa. 226, 206 A.2d 16 (1965) (enforceability of restrictive covenant; "more appropriate"); *In re* Mohney's Estate, 416 Pa. 107, 204 A.2d 916 (1964) (distribution of estate; statutory remedy available; "available and appropriate"); Lakeland Joint School Dist. Auth. v. School Dist., 414 Pa. 451, 200 A.2d 748 (1964) (right to withdraw from a jointure contract; "available and appropriate"; no other "available and appropriate" remedies existed so a declaratory judgment was allowed); Stevenson v. Stein, 412 Pa. 478, 195 A.2d 268 (1963) (declaration of ownership by adverse possession; "more appropriate"; no other "appropriate" remedy was available so a declaratory judgment was permitted); State Farm Mut. Automobile Ins. Co. v. Semple, 407 Pa. 572, 180 A.2d 925 (1962) (liability insurance policy; "more appropriate"); McWilliams v. McCabe, 406 Pa. 644, 179 A.2d 222 (1962) (reformation of contract; "established and available") (In a concurring and dissenting opinion, Mr. Justice Benjamin Jones suggested, contra to the majority opinion, that the availability of an alternative remedy should not per se bar a declaratory judgment, but should merely be *one factor* to consider when the court exercises its discretion. *Id.* at 658, 179 A.2d at 229.); *In re* Holt's Estate, 405 Pa. 244, 174 A.2d 874 (1961) (declaratory judgment proceeding to set aside the probate of a will; the proceeding was held to be improper, but was affirmed anyway; "more appropriate"); Wirkman v. Wirkman Co., 392 Pa. 63, 139 A.2d 658 (1958) (breach of covenant; parties had provided for arbitration; "more appropriate").

30. *In re* Johnson's Estate, 403 Pa. 476, 171 A.2d 518 (1961) (construction of a will); Daniels Co. v. Nevling, 385 Pa. 276, 122 A.2d 814 (1956) (interpretation of a contract); Philadelphia Mfrs. Mut. Fire Ins. Co. v. Rose, 364 Pa. 15, 70 A.2d 316 (1950) (fire insurance policy); Guerra v. Galatic, 185 Pa. Super. 385, 137 A.2d 866 (1958) (determination of boundaries).

31. 432 Pa. 89, 246 A.2d 654 (1968) (easement rights).

32. *Id.* at 94, 246 A.2d at 656. In a concurring opinion Mr. Justice

more liberal group of cases is *In re Johnson's Estate*[33] in which the same court declared:

> An examination of the legislative history . . . clearly reveals the intent of the legislature that declaratory judgments be considered an alternative, rather than an extraordinary, remedy and that the existence of another remedy, in law or in equity, will not per se bar declaratory judgment. Since passage of the 1943 statute our Court has consistently taken this position.[34]

The majority of the Pennsylvania cases adhere to the more restrictive rule barring a declaratory judgment when alternative remedies are available.[35] Although *Pitt* clearly reaffirms this restrictive rule, the outcome to be expected in any one case is apt to be uncertain because of the conflicting results in the decided cases.

One reason for the conflicting results in the decided cases is the use of the word "mere" in the statutory pronouncement that the "mere" availability of alternative remedies shall not debar a declaratory judgment.[36] The use of the word "mere" renders the statute susceptible to the interpretation that if the alternative remedy is *more* than just "available", a declaratory judgment *will* be debarred. Taking this approach, a court can declare that if an alternative remedy is "appropriate", "adequate", or "established", then the alternative remedy is more than just "available", and, hence, the declaratory judgment should be debarred.

The validity of this "more than mere" approach is questionable. A court advocating such an approach may be accused of hair-splitting. It is somewhat difficult to conceive of an alternative remedy which would be "available" and yet at the same time not be "established" or capable of being deemed "appropriate".

In interpreting the Uniform Declaratory Judgments Act, attention should be directed to the consideration that "the declaratory judgment action is an instrumentality to be wielded in the interest of preventive justice, and its scope should be kept wide and liberal, and should not be hedged about by technicalities."[37] The Act itself declares that its provisions are to be "liberally construed and ad-

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Benjamin Jones disagreed with the majority concerning the holding quoted in the accompanying text. *Id.* at 95, 246 A.2d at 657.

33. 403 Pa. 476, 171 A.2d 518 (1961) (construction of a will).

34. *Id.* at 485-86, 171 A.2d at 522. In dissent the then Mr. Justice Bell declared that the majority opinion had ignored established Pennsylvania principles on declaratory judgments and that the result would be an unsettling of the existing law. *Id.* at 491, 171 A.2d at 525.

35. *See* cases cited note 29 *supra*; ANDERSON, *supra* note 12, at 401.

36. PA. STAT. ANN. tit. 12, § 836 (1953).

37. ANDERSON, *supra* note 12, at 14-15.

ministered."[38] These guidelines of construction have led to the view that:

> [I]t is far more consonant with the ends of justice to follow the more modern, sounder, and juster rule that the declaratory judgment procedure is equally applicable in all cases where it is proper to apply it without regard to the existence of any other remedy.[39]

It appears that the declaratory judgment procedure is particularly applicable and proper in the case of a controverted insurance contract, as in *Pitt*. In fact, controversies between insurer and insured have been adjudicated in declaratory judgment proceedings independent of a statute.[40] Declaratory judgments are especially common in insurance litigation[41] and the general rule in the United States is that a declaratory judgment may be entertained to determine the extent of insurance coverage and to adjudicate the insurer's duties under an insurance contract, regardless of the availability of other remedies.[42] Pennsylvania has generally been more restrictive than the general rule in its use of declaratory judgments in insurance cases. However, in 1950 the Pennsylvania Supreme Court allowed a declaratory judgment for the purpose of determining whether or not coverage existed under a fire insurance policy, even though the "adequate" remedy of assumpsit was also available.[43]

Compelling reasons support the use of declaratory judgments in liability insurance cases such as *Pitt*. Declaratory judgments eliminate the burden, otherwise cast upon the insured, of first defending itself against claims of third parties and then afterward having to sue the insurer in assumpsit. In the absence of a declaratory judgment it might be years before the insured, through multiple lawsuits, finally receives reimbursement. This is particularly likely if every verdict favorable to a third party must first be appealed before the insured can sue the insurer. Furthermore, the insured would hesitate to settle with a third party because of the possibility that, in the subsequent suit against the insurer, the insurer might successfully raise the defense that the settlement was unreasonable or unnecessary. Because of these circumstances, the declaratory judgment is a particularly effective remedy and the alternative remedies would appear, by comparison, to be inadequate.

It is submitted that *Pitt* further adds to what has been charac-

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38. PA. STAT. ANN. tit. 12, § 842 (1953).
39. ANDERSON, *supra* note 12, at 395.
40. ANDERSON, *supra* note 12, at 6.
41. *See* Note, *Developments in the Law—Declaratory Judgments—1941-1949*, 62 HARV. L. REV. 787, 850 (1949).
42. *See* 26 C.J.S. *Declaratory Judgments* § 63 (1956).
43. Philadelphia Mfrs. Mut. Fire Ins. Co. v. Rose, 364 Pa. 15, 22, 70 A.2d 316, 319 (1950).

terized as the "Pennsylvania muddle".[44] To clear the muddle, Pennsylvania should adopt a consistent, definitive, and forward-looking policy which is more consonant with the purpose of the declaratory judgment. Specifically, Pennsylvania might well consider liberalizing its "no alternative remedies" requirement. Instead of requiring that there must be *no* alternative remedies available, Pennsylvania could justifiably require that there must be no *more effective and expedient* remedies available.[45] Thus, claimants could be afforded the benefit of declaratory relief so long as the granting of such relief would serve a useful purpose.

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44. BORCHARD, *supra* note 12, at 318.
45. For an example of a decision adopting this view, *see* Recall Bennett Comm. v. Bennett, 196 Or. 299, 249 P.2d 479 (1952).

CONSTITUTIONAL LAW—RETROACTIVE APPLICATION OF THE JURY TRIAL REQUIREMENT

DeBacker v. Brainard, — U.S. —, 90 S. Ct. 163 (1969).

The United States Supreme Court recently held that its decisions in *Duncan v. Louisiana*[1] and *Bloom v. Illinois*,[2] which guaranteed the right to trial by jury for serious criminal offenses in state actions by applying the sixth amendment to the states through the fourteenth amendment, will not be applied retroactively to review adjudications of delinquency made without a jury in state juvenile courts.[3]

DeBacker had been committed to the Boys Training School at Kearney, Nebraska following a hearing before a juvenile court judge sitting without a jury. The hearing arose out of allegations sufficient to require a jury trial under *Duncan* and *Bloom* if the act had been committed by an adult. DeBacker requested a jury trial prior to the hearing, which request was denied, and he subsequently sought habeas corpus based on that denial. The petition for habeas corpus was denied, and, on appeal to the Nebraska Supreme Court, the decision was affirmed by a divided court.[4] In the United States Supreme Court, the issue was considered, *inter alia*, whether—in light of the decisions in *Duncan* and *Bloom*—a jury trial was required in state juvenile proceedings based on an act which, if committed by an adult, would require a jury trial if requested. The Court refused to decide this issue based on its earlier holding in *DeStefano v. Woods*[5] that the *Duncan* and *Bloom* decisions would apply only prospectively. Since DeBacker's juvenile hearing had been held prior to the date of those two cases, there could be no relief.[6]

DeBacker, which upholds the prospective application of a new decision in the field of criminal procedure, is indicative of a fairly recent trend toward uniform prospective application of such new rules rather than the earlier practice of deciding retroactive or

1. 391 U.S. 145 (1968).
2. 391 U.S. 194 (1968).
3. DeBacker v. Brainard, — U.S. —, 90 S. Ct. 163 (1969).
4. Four of the seven justices thought that the Nebraska statute requiring hearings without a jury was unconstitutional, but the Nebraska Constitution in Article V provides that five judges must concur to hold a legislative act unconstitutional.
5. 392 U.S. 631 (1968).
6. DeBacker v. Brainard, — U.S. —, 90 S. Ct. 163, 164 (1969).

prospective application on the merits of each case. The Supreme Court has given retroactive application to cases where coerced confessions are involved,[7] where paupers are denied the right to appeal,[8] and where the right to counsel is denied.[9] On the other hand, in cases involving illegal search and seizure,[10] comment by the prosecutor on defendant's silence,[11] lack of *Miranda* warnings,[12] and now right to trial by jury,[13] the new rule has been given only prospective application.

An historical review of the applicable cases[14] shows that, as Mr. Justice Cardozo said, ". . . the federal constitution has no voice on the subject [of prospective or retroactive application]."[15] Even Mr. Justice Black, who has dissented in every recent case holding for prospective application of a new rule, has agreed that there are valid arguments to be made for prospective application.[16] In fact, ". . . there is no impediment—constitutional or philosophical—to the use of the same rule in the constitutional area where the exigencies of the situation require."[17] Relying on this historical view, the Supreme Court in *Linkletter v. Walker*[18] defined several tests with which a determination of retroactivity may be made: (1) the purpose of the new rule, (2) the reliance placed upon the old doctrine, and (3) the effect of retroaction on the administration of justice.[19] However, above all these standards there appeared to be one overriding consideration in the early days of the criminal procedure revolution. The Court stated in *Linkletter* that in all the cases where an overruling was applied retroactively, it was done so because the principle involved went to the very fairness of the trial, the heart of the fact-finding integrity.[20] *Griffin v. Illinois*,[21] holding that pauper defendants must be allowed the right to appeal, was applied retroactively to a defendant, who had been denied an

7. Fay v. Noia, 372 U.S. 391 (1963); Reck v. Pate, 367 U.S. 433 (1961).
8. Eskridge v. Washington Prison Bd., 357 U.S. 215 (1968).
9. Doughty v. Maxwell, 376 U.S. 202 (1964).
10. Linkletter v. Walker, 381 U.S. 618 (1965).
11. Tehan v. Shott, 382 U.S. 406 (1966).
12. Johnson v. New Jersey, 384 U.S. 719 (1966).
13. DeStefano v. Woods, 392 U.S. 631 (1968).
14. This review is set out in Linkletter v. Walker, 381 U.S. 618 (1965).
15. Great Northern R.R. v. Sunburst Oil & Refining Co., 287 U.S. 358, 364 (1932).
16. Mosser v. Darrow, 341 U.S. 267, 276 (1951) (dissenting opinion).
17. Linkletter v. Walker, 381 U.S. 618, 628 (1965).
18. *Id.*
19. *Id.* at 636.
20. *Id.* at 639.
21. 351 U.S. 12 (1956).

appeal in 1935, because the ability to appeal is so basic to the fairness of the judicial system.[22] *Gideon v. Wainwright*[23] was applied retroactively because without counsel defendants are unable to find their way through the technical morass of criminal procedure, and thus fair fact-finding is impossible. *Jackson v. Denno*[24] was applied retroactively because of the likelihood that coerced confessions will introduce incorrect statements into the fact-finding process.[25]

That this fairness of trial fact-finding integrity test was the principal consideration for retroactive application may easily be seen by comparing the above cases with the decision in *Linkletter*.[26] That case tested the application of the *Mapp v. Ohio*[27] exclusionary rule. Consideration of the three tests listed by the court in *Linkletter* indicated that most important test is the one relating to the purpose of the new decision. Comparison shows that the results of the test considering the effect of retroactivity on the administration of justice would be the same in all the cases, convicted parties must be retried, stale evidence must be considered, overcrowded court calendars must be further cluttered; in short the effect of retroactivity would be immense in all cases. The test of reliance on the old rule will show similarity as great. What else would enforcement officials rely upon but the criminal procedure currently being condoned by the courts? Therefore, the test relating to the purpose of the new rule is the key factor. As described above, in the three areas where the rule was retroactively applied, the purpose of the new rule went to the integrity of the fact finding. In *Linkletter*, however, the purpose of the new rule as expounded in *Mapp* is to protect the sanctity of the individual by deterring the lawless searches and seizures by the police.[28] The exclusion of the evidence obtained in such searches does not add to the integrity of the fact-finding process of the trial; instead, it protects citizens from overzealous police. Thus this purpose test is the only real distinction between the cases applied prospectively and those applied retroactively. That this test is a valid discriminating factor cannot be denied. If the old standard deterred the proper finding of facts or encouraged the admission of incorrect facts, any trial under that standard is inherently unfair, and the new standard should be applied retroactively so that those convicted under such a standard may be retried. If, however, the new standard does not go to this fact-finding process, but rather goes merely to some collateral right (*e.g.*,

22. Eskridge v. Washington Prison Bd., 357 U.S. 214 (1958).
23. 372 U.S. 335 (1963).
24. 378 U.S. 368 (1964).
25. *See* cases cited note 7 *supra*.
26. 381 U.S. 618 (1965).
27. 367 U.S. 643 (1961).
28. 381 U.S. 618, 636 (1965).

privacy under the *Mapp*[29] rule), then the trial itself was not unfair, and the new ruling ought only to be applied to the future.[30]

It appears that in *DeStefano v. Woods*[31] and *DeBacker v. Brainard*,[32] the Court has slipped away from this standard requiring retroactive application to decisions enhancing the fact-finding process with respect to trial by jury. But the withdrawal has been gradual and an examination of the interim cases is helpful.

Tehan v. Shott[33] tested the retroactive applicability of the rule in *Griffin v. California*[34] which prohibits comment by a prosecutor or judge on the silence of a defendant at trial. Under consideration was the privilege against self-incrimination. Here the tests of reliance on the old rule and the detrimental effect on the administration of justice of a retroactive application would lead to a conclusion that the rule ought only to be applied prospectively, but, as shown above, these two tests will always lead to that finding. The crucial test should be whether the purpose of the new rule is to enhance the correct finding of facts. The Court found that the purposes which were behind the rule do not require retroactive application because the fifth amendment privilege against self-incrimination is not an adjunct to the ascertainment of the truth, but rather is a reflection of the constitutional values behind the right to be let alone.[35] Thus the Court was able to hold that the rule should be applied only prospectively.

It appears to this writer that the *Tehan* decision, although it may be correct, represents the first minor intrusion on the valid principle discussed above. The decision bends the fact-finding test to the extent that comment by the prosecutor on defendant's silence may indeed effect the jury's finding of facts by prejudicing defendant's case. In *Tehan* the day was carried for prospective application by consideration of the other two tests.

In *Johnson v. New Jersey*[36] the Court was called upon to decide the retroactivity of the rules announced in *Miranda* and *Escobedo*.[37] In the *Johnson* case,[38] language is found which begins to undermine the standard found so important in earlier cases:

29. *Id.* at 637.
30. *See, e.g.*, Linkletter v. Walker, 381 U.S. 618, at 638-39.
31. 392 U.S. 631 (1968).
32. DeBacker v. Brainard, — U.S. —, 90 S. Ct. 163 (1969).
33. 382 U.S. 406 (1966).
34. 380 U.S. 609 (1965).
35. 382 U.S. 406, 416 (1966).
36. 384 U.S. 719 (1966).
37. Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964).
38. Johnson v. New Jersey, 384 U.S. 719 (1966).

"Finally, we emphasize," said the Court, "that the question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree."[39] Once having set out this qualification, it is obvious that the court may now decide for prospective application in every case by simply balancing the purpose of the rule test and outweighing its results with the always favorable (to prospective application) reliance and administration of justice tests. Look at *Johnson*:

> Thus while *Escobedo* and *Miranda* provide important new *safeguards against the use of unreliable statements at trial*, the non-retroactivity will not preclude persons whose trials have already been completed from invoking the same safeguards as part of an involuntariness claim.[40]

This all sounds well and good, but Johnson was sentenced to death and the New Jersey Court Rules precluded further hearings on voluntariness.[41]

Compare this decision with *Stovall v. Denno*,[42] which considered whether decisions requiring that defendant's counsel be present when defendant is exhibited to identifying witnesses should be applied retroactively.[43] It was seen that the right to counsel is essential, and that the rule requiring counsel applied retroactively, but here the Court found that it is only a matter of degree. The Court quoted the above passage from *Johnson* favorably and then said that these probabilities must be weighed against the prior justified reliance on the old rule and the impact of the new rule on the administration of justice. Admitting that a conviction based on faulty identification would be a "gross miscarriage of justice," nevertheless the Court applied the rule only prospectively.

That brings this discussion to *DeStefano v. Woods*,[44] where the right to a jury trial was given only prospective application, and *DeBacker v. Brainard*,[45] where the Court refused to review the *DeStefano* ruling where juveniles are involved. In these decisions the purpose of the new rule apparently goes directly to the integrity of the fact-finding at trial. In *DeStefano* the Court stated the purpose of the rule to be the prevention of repression and arbitrariness;[46] these are at the very heart of the fact-finding process! Yet, the application of the matter of degree argument[47] allowed the

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39. *Id.* at 728-29.
40. *Id.* at 730 (emphasis added).
41. *Id.* at 735.
42. 388 U.S. 293 (1967).
43. Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 (1967).
44. 392 U.S. 631 (1968).
45. — U.S. —, 90 S. Ct. 163 (1969).
46. 392 U.S. 631, 633 (1968).
47. We would not assert, however, that every criminal trial . . . or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would

Court to apply *Duncan*[48] and *Bloom*[49] only prospectively.

DeBacker v. Brainard[50] provided a vehicle whereby the Court could have retreated from its present standard, which seems to require prospective application in every case, and returned to that standard which was so valuable in coerced confession and right to counsel cases. Instead, the Court continues to ignore the very valid standard allowing retroactive application where the new rule enhances the fact-finding integrity at trial and continues to rely, almost wholly, upon the previous reliance and administration of justice tests.

Indeed by applying a proper standard in *DeBacker* the Court could have reached the merits of what seems to be, in light of *In re Gault*,[51] an important issue. Do juveniles have the right to trial by jury in state juvenile court proceedings? The decision in *DeStefano* appears to have most definitely buried the fairness standard and prompts some question as to whether *Griffin v. Illinois*,[52] *Gideon v. Wainwright*,[53] and *Jackson v. Denno*[54] would have been applied retroactively today.

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by a jury.
DeStefano v. Woods, 392 U.S. 631, 633-34 (1968).
48. Duncan v. Louisiana, 391 U.S. 145 (1968).
49. Bloom v. Illinois, 391 U.S. 194 (1968).
50. — U.S. —, 90 S. Ct. 163 (1969).
51. 387 U.S. 1 (1967).
52. 351 U.S. 12 (1956).
53. 372 U.S. 335 (1963).
54. 378 U.S. 368 (1964).